

The
**NORTH CAROLINA
REGISTER**

IN THIS ISSUE

EXECUTIVE ORDER

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ISSUE DATE: March 1, 1993

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INFORMATION ABOUT THE NORTH CAROLINA REGISTER AND ADMINISTRATIVE CODE

NORTH CAROLINA REGISTER

The *North Carolina Register* is published twice a month and contains information relating to agency, executive, legislative and judicial actions required by or affecting Chapter 150B of the General Statutes. All proposed administrative rules and notices of public hearings filed under G.S. 150B-21.2 must be published in the Register. The Register will typically comprise approximately fifty pages per issue of legal text.

State law requires that a copy of each issue be provided free of charge to each county in the state and to various state officials and institutions.

The *North Carolina Register* is available by yearly subscription at a cost of one hundred and five dollars (\$105.00) for 24 issues. Individual issues may be purchased for eight dollars (\$8.00).

Requests for subscription to the North Carolina Register should be directed to the Office of Administrative Hearings, P. O. Drawer 27447, Raleigh, N. C. 27611-7447.

ADOPTION AMENDMENT, AND REPEAL OF RULES

The following is a generalized statement of the procedures to be followed for an agency to adopt, amend, or repeal a rule. For the specific statutory authority, please consult Article 2A of Chapter 150B of the General Statutes.

Any agency intending to adopt, amend, or repeal a rule must first publish notice of the proposed action in the *North Carolina Register*. The notice must include the time and place of the public hearing (or instructions on how a member of the public may request a hearing); a statement of procedure for public comments; the text of the proposed rule or the statement of subject matter; the reason for the proposed action; a reference to the statutory authority for the action and the proposed effective date.

Unless a specific statute provides otherwise, at least 15 days must elapse following publication of the notice in the *North Carolina Register* before the agency may conduct the public hearing and at least 30 days must elapse before the agency can take action on the proposed rule. An agency may not adopt a rule that differs substantially from the proposed form published as part of the public notice, until the adopted version has been published in the *North Carolina Register* for an additional 30 day comment period.

When final action is taken, the promulgating agency must file the rule with the Rules Review Commission (RRC). After approval by RRC, the adopted rule is filed with the Office of Administrative Hearings (OAH).

A rule or amended rule generally becomes effective 5 business days after the rule is filed with the Office of Administrative Hearings for publication in the North Carolina Administrative Code (NCAC).

Proposed action on rules may be withdrawn by the promulgating agency at any time before final action is taken by the agency or before filing with OAH for publication in the NCAC.

TEMPORARY RULES

Under certain emergency conditions, agencies may issue temporary rules. Within 24 hours of submission to OAH, the Codifier of Rules must review the agency's written statement of findings of need for the temporary rule pursuant to the provisions in G.S. 150B-21.1. If the Codifier determines that the findings meet the criteria in G.S. 150B-21.1, the rule is entered into the NCAC. If the Codifier determines that the findings do not meet the criteria, the rule is returned to the agency. The agency may supplement its findings and resubmit the temporary rule for an additional review or the agency may respond that it will remain with its initial position. The Codifier, thereafter, will enter the rule into the NCAC. A temporary rule becomes effective either when the Codifier of Rules enters the rule in the Code or on the sixth business day after the agency resubmits the rule without change. The temporary rule is in effect for the period specified in the rule or 180 days, whichever is less. An agency adopting a temporary rule must begin rule-making procedures on the permanent rule at the same time the temporary rule is filed with the Codifier.

NORTH CAROLINA ADMINISTRATIVE CODE

The North Carolina Administrative Code (NCAC) is a compilation and index of the administrative rules of 25 state agencies and 38 occupational licensing boards. The NCAC comprises approximately 15,000 letter size, single spaced pages of material of which approximately 35% of is changed annually. Compilation and publication of the NCAC is mandated by G.S. 150B-21.18.

The Code is divided into Titles and Chapters. Each state agency is assigned a separate title which is further broken down by chapters. Title 21 is designated for occupational licensing boards.

The NCAC is available in two formats.

- (1) Single pages may be obtained at a minimum cost of two dollars and 50 cents (\$2.50) for 10 pages or less, plus fifteen cents (\$0.15) per each additional page.
- (2) The full publication consists of 53 volumes, totaling in excess of 15,000 pages. It is supplemented monthly with replacement pages. A one year subscription to the full publication including supplements can be purchased for seven hundred and fifty dollars (\$750.00). Individual volumes may also be purchased with supplement service. Renewal subscriptions for supplements to the initial publication are available.

Requests for pages of rules or volumes of the NCAC should be directed to the Office of Administrative Hearings.

CITATION TO THE NORTH CAROLINA REGISTER

The *North Carolina Register* is cited by volume, issue, page number and date. 1:1 NCR 101-201, April 1, 1986 refers to Volume 1, Issue 1, pages 101 through 201 of the *North Carolina Register* issued on April 1, 1986.

FOR INFORMATION CONTACT: Office of
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NORTH CAROLINA REGISTER



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NORTH CAROLINA REGISTER
Publication Schedule
(August 1992 - December 1993)

Issue Date	Last Day for Filing	Last Day for Electronic Filing	Earliest Date for Public Hearing	Earliest Date for Adoption by Agency	Last Day to Submit to RRC	*Earliest Effective Date
*****	*****	*****	*****	*****	*****	*****
08/03/92	07/13/92	07/20/92	08/18/92	09/02/92	09/20/92	11/02/92
08/14/92	07/24/92	07/31/92	08/29/92	09/13/92	09/20/92	11/02/92
09/01/92	08/11/92	08/18/92	09/16/92	10/01/92	10/20/92	12/01/92
09/15/92	08/25/92	09/01/92	09/30/92	10/15/92	10/20/92	12/01/92
10/01/92	09/10/92	09/17/92	10/16/92	10/31/92	11/20/92	01/04/93
10/15/92	09/24/92	10/01/92	10/30/92	11/14/92	11/20/92	01/04/93
11/02/92	10/12/92	10/19/92	11/17/92	12/02/92	12/20/92	02/01/93
11/16/92	10/23/92	10/30/92	12/01/92	12/16/92	12/20/92	02/01/93
12/01/92	11/06/92	11/13/92	12/16/92	12/31/92	01/20/93	03/01/93
12/15/92	11/24/92	12/01/92	12/30/92	01/14/93	01/20/93	03/01/93
01/04/93	12/09/92	12/16/92	01/19/93	02/03/93	02/20/93	04/01/93
01/15/93	12/22/92	12/31/92	01/30/93	02/14/93	02/20/93	04/01/93
02/01/93	01/08/93	01/15/93	02/16/93	03/03/93	03/20/93	05/03/93
02/15/93	01/25/93	02/01/93	03/02/93	03/17/93	03/20/93	05/03/93
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10/15/93	09/24/93	10/01/93	10/30/93	11/14/93	11/20/93	01/04/94
11/01/93	10/11/93	10/18/93	11/16/93	12/01/93	12/20/93	02/01/94
11/15/93	10/22/93	10/29/93	11/30/93	12/15/93	12/20/93	02/01/94
12/01/93	11/05/93	11/15/93	12/16/93	12/31/93	01/20/94	03/01/94
12/15/93	11/24/93	12/01/93	12/30/93	01/14/94	01/20/94	03/01/94

* The "Earliest Effective Date" is computed assuming that the agency follows the publication schedule above, that the Rules Review Commission approves the rule at the next calendar month meeting after submission, and that RRC delivers the rule to the Codifier of Rules five (5) business days before the 1st business day of the next calendar month.

EXECUTIVE ORDER NUMBER 2 SMALL BUSINESS COUNCIL

WHEREAS, the growth and development of successful small businesses is essential to the economic well-being of our State and Nation; and

WHEREAS, North Carolina State Government agencies administer numerous programs which directly affect small businesses, and

WHEREAS, several state-funded North Carolina private, non-profit organizations administer programs which support the creation and growth of small businesses, and

WHEREAS, there is no uniform, comprehensive structure which allows small business assistance programs to participate in the State's decision-making process with regard to small business development, and

WHEREAS, coordination and collaboration among small business assistance programs is essential to an efficient and effective small business support infrastructure, and

WHEREAS, this administration is committed to creating an environment which fosters a world-class small business sector;

NOW, THEREFORE, by the authority vested in me as Governor by the constitution and laws of North Carolina, IT IS ORDERED:

Section 1. Establishment.

The North Carolina Small Business Council is established hereby. The Council shall be composed of the Lieutenant Governor and sixteen additional members appointed by the Governor. The appointed members shall serve staggered three-year terms to begin thus: five of the members shall be appointed to one-year terms, five shall be appointed to two-year terms, and six shall be appointed to three-year terms. Thereafter, all appointments shall be for three-year terms. The Lieutenant Governor shall serve as Chair. The Secretary of State, Secretary of Commerce, Secretary of Revenue, Commissioner of Labor, President of the University of North Carolina System, and President of the System of Community Colleges or their designees shall serve as non-voting, ex-officio members.

Section 2. Meetings.

The Council shall meet at least once each quarter and may hold special meetings at any time at the call of the Chair or the Governor.

Section 3. Expenses.

Council members shall receive necessary per diem, and travel and subsistence expenses, in accordance with North Carolina Law. Funds for these expenses shall come from the Department of Commerce budget.

Section 4. Purposes.

The purposes of the Small Business Council are:

- (A) To recommend to the Governor, General Assembly, and Economic Development Board legislation, programs, and other actions required to nurture small business growth and development.
- (B) To recommend to the Governor, General Assembly, and Economic Development Board changes in statutes and regulations, including the State tax structure, which affect small businesses in North Carolina.
- (C) To foster coordination and collaboration among state agencies, and private, non-profit organizations involved in small business development.
- (D) To identify, together with State agencies, the need for small business programs in education, training, marketing, funding resources, exports, purchasing and contracts, technology and related areas.
- (E) In collaboration with officials in the Departments of Commerce and Transportation assigned primary responsibility for women and minority business issues, to recommend to the Governor and General Assembly a coordinated response by state agencies to increase the number of women-owned and minority-owned business starts in North Carolina.
- (F) To plan and conduct annual forums on small business development.
- (G) To assist in the creation of a clearing-house within state government, responsible for providing a coordinated response to requests for small business assistance.
- (H) To conduct public hearings and interviews and solicit non-confidential information to effect its other duties.

Section 5. Administration.

The Lieutenant Governor's office and the Depart-

ment of Commerce shall provide staff and administrative support services for the Council.

Section 6. Cooperation.

It shall be the responsibility of each Cabinet Department Secretary to make every reasonable effort for his or her department to cooperate with the North Carolina Small Business Council to carry out the provisions of this Order.

This Order shall be effective immediately.

Done in the Capital City of Raleigh, North Carolina, this 11th day of February, 1993.

**TITLE 2 - DEPARTMENT OF
AGRICULTURE**

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Pesticide Board intends to repeal rules cited as 2 NCAC 9L .1801 - .1804 and adopt rule cited as 2 NCAC 9L .1805.

The proposed effective date of this action is July 1, 1993.

The public hearings will be conducted:

March 16, 1993

7:00 p.m.

Guilford Co. Coop. Extension Service
Auditorium, Agricultural Center
3309 Burlington Road
Greensboro, North Carolina

March 18, 1993

7:00 p.m.

Western Agricultural Center
Livestock Building
1301 Fanning Bridge Road
Fletcher, North Carolina

March 22, 1993

7:00 p.m.

Lenoir Co. Coop. Extension Service
Auditorium
2026 Pink Hill Highway (Hwy. 11)
Kinston, North Carolina

Reason for Proposed Action:

2 NCAC 9L .1801 - .1804 - The rule to be adopted by reference supersedes and replaces existing state rules.

2 NCAC 9L .1805 - To adopt by reference Part 170 of Title 40 of the Code of Federal Regulations entitled "Worker Protection Standard."

Comment Procedures: Interested persons may present statements either orally or in writing at the public hearings or in writing prior to the hearings by mail addressed to John L. Smith, Secretary, North Carolina Pesticide Board, P. O. Box 27647, Raleigh, NC 27611.

**CHAPTER 9 - FOOD AND DRUG
PROTECTION DIVISION**

SUBCHAPTER 9L - PESTICIDE SECTION

**SECTION .1800 - WORKER PROTECTION
STANDARDS FOR AGRICULTURAL
PESTICIDES**

.1801 DEFINITIONS

~~(a) The term "reentry time" means the period of time immediately following the application of a pesticide to a field when unprotected workers should not enter as provided for in Rule .1803 of this Section.~~

~~(b) The term "farm worker" or "worker" means any person or persons engaged in agricultural hand labor in the field.~~

~~(c) The term "field" means any treated land area, or part thereof, upon which one or more pesticides are used for agricultural purposes.~~

~~(d) The term "protective clothing" means clothing which is used to protect the human body from contact with pesticides. Protective clothing includes as a minimum, but is not limited to, clean outer clothing such as a hat or other suitable head covering, a long sleeved shirt, and long legged trousers or a coverall type garment (all of closely woven fabric covering the body, including arms and legs), shoes, and socks.~~

~~(e) "Toxicity Category I Pesticides" means any pesticide products which are required to display the signal word "DANGER" prominently on the label.~~

Statutory Authority G.S. 143-458(a).

.1802 WARNINGS

~~When workers are reasonably expected to be entering a field treated with a pesticide for which the reentry time has not expired, appropriate and timely warning to such workers shall be given by the person directly supervising the farm workers. The warning may be given orally or by posting warning signs at the usual points of entrance to the field, or on bulletin board at points where the workers usually assemble for instructions. Where the person directly supervising the farm workers has reason to believe that a farm worker is unable to read, he shall give the farm worker oral warning and make reasonable effort to ensure understanding of such warning. When the person directly supervising the farm workers has reason to believe that a farm worker is unable to understand the English language, warnings shall be given in appropriate languages other than the English language. Warnings shall be given in such a manner as to inform workers of the following:~~

- (1) ~~The type or description of protective clothing;~~
- (2) ~~The type of pesticide applied;~~
- (3) ~~Time and date of the most recent application;~~
- (4) ~~The period of time the area or field should not be entered without appropriate protective clothing; and~~
- (5) ~~The actions to take in the event of accidental exposure.~~

~~Posted warnings shall be clearly visible at a distance of 25 feet and shall be of such durability and construction that they will remain clearly legible for the duration of the reentry time.~~

Statutory Authority G.S. 143-458(a).

.1803 REENTRY TIMES

(a) ~~Unless exempted from such requirements, or a longer reentry time has been assigned to a pesticide by the label or by these Regulations, the reentry time for a pesticide shall be that period of time required for sprays to dry or dusts to settle.~~

(b) ~~Pesticides classified as EPA Toxicity Category I pesticides shall have a reentry time of at least 24 hours, except as otherwise provided in this Rule.~~

(c) ~~Pesticides containing ethyl parathion, methyl parathion, demeton, Azodrin, carbophenothion, Metasystox-R, Bidrin, or endrin shall have a reentry time of at least 48 hours, except as otherwise provided in these Rules.~~

(d) ~~If the label for a pesticide bears restrictions against workers entering treated fields which are more stringent than those set forth in this Rule, the label restrictions shall apply.~~

Statutory Authority G.S. 143-458(a).

.1804 LABELS AND EXEMPTIONS

~~The restrictions set forth in this Section shall not apply with respect to:~~

- (1) ~~Mosquito abatement treatments and related public pest control programs;~~
- (2) ~~Greenhouse treatments which are applied in accordance with labeling directions and restrictions;~~
- (3) ~~Livestock and other animal treatments which are applied in accordance with labeling directions and restrictions;~~
- (4) ~~Treatment of golf courses and similar non-agricultural areas which are applied in accordance with labeling directions and restrictions;~~
- (5) ~~Applications incorporated in the soil by~~

~~mechanical means and in accordance with labeling directions and restrictions.~~

Statutory Authority G.S. 143-458(a).

.1805 ADOPTION BY REFERENCE

The North Carolina Pesticide Board hereby adopts by reference, including subsequent amendments, Part 170 of Title 40 of the Code of Federal Regulations, entitled "Worker Protection Standard." Copies of this material may be obtained from the U.S. Government Printing Office, Washington, D.C. 20402, at a cost determined by that office.

Statutory Authority G.S. 143-458(a).

TITLE 10 - DEPARTMENT OF HUMAN RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services intends to amend rules cited as 10 NCAC 14L .0602.

The proposed effective date of this action is July 1, 1993.

The public hearing will be conducted at 1:00 p.m. on May 5, 1993 at the Sheraton Inn, 4501 Creedmoor Road at Crabtree Valley Mall, Raleigh, N.C.

Reason for Proposed Action: To clarify that a residential treatment facility serving children and adolescents who are mentally ill shall serve no more than a total of nine children and adolescents at any one time.

Comment Procedures: Any interested person may present his comments by oral presentation or by submitting a written statement. Persons wishing to make oral presentations should contact Charlotte Tucker, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 325 N. Salisbury Street, Raleigh, N.C. 27603 (919) 733-4774 before May 5, 1993. Comments submitted as a written statement must be sent to the above address by May 5, 1993 and must state the rules to which the comments are addressed. Time limits for oral remarks may be imposed by the Commis-

sion Chairman. Fiscal information on these rules is available from the same address upon request.

Editor's Note: This Rule was filed as a temporary amendment effective February 8, 1993, for a period of 136 days to Expire on July 1, 1993.

**CHAPTER 14 - MENTAL HEALTH:
GENERAL**

**SUBCHAPTER 14L -LICENSURE RULES
FOR MENTAL HEALTH FACILITIES**

**SECTION .0600 - RESIDENTIAL
TREATMENT FOR CHILDREN AND
ADOLESCENTS WHO ARE
MENTALLY ILL**

.0602 CAPACITY

Each facility shall serve no more than nine children and adolescents at any one time.

Statutory Authority G.S. 122C-26; 143B-147.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Division of Services for the Blind intends to amend rule cited as 10 NCAC 19G .0502.

The proposed effective date of this action is June 1, 1993.

The public hearing will be conducted at 10:00 a.m. on March 16, 1993 at the Governor Morehead School Campus, Fisher Building Conference Room, 309 Ashe Avenue, Raleigh, NC 27606.

Reason for Proposed Action: To increase training opportunities for vending stand operators with visual impairments..

Comment Procedures: Any interested person may present his/her comments either in writing at the hearing or orally at the hearing. Any person may request information, permission to be heard, or copies of the proposed regulations, by writing or calling Herman Gruber, Div. of Services for the Blind, 309 Ashe Ave., Raleigh, NC 27606, 733-

9822.

**CHAPTER 19 - SERVICES FOR THE
BLIND**

**SUBCHAPTER 19G - VOCATIONAL
REHABILITATION**

SECTION .0500 - ECONOMIC NEED

.0502 ECONOMIC NEEDS POLICIES

(a) The Services for the Blind will establish economic need for each client either simultaneously with or within a reasonable time prior to the provision of those services for which the division requires a needs test. This needs test is in accordance with S.L. 1989, c. 500, s. 43.

(b) The Division of Services for the Blind will furnish the following services not conditioned on economic need:

- (1) evaluation of rehabilitation potential (including diagnostic and related services);
- (2) counseling, guidance, and referral;
- (3) tuition and supplies for publicly operated sheltered workshops;
- (4) tuition and fees;
- (5) interpreter services for the deaf;
- (6) reader services, rehabilitation teaching services, and orientation and mobility services for the blind;
- (7) recruitment and training services to provide new employment opportunities in rehabilitation, health, welfare, public safety, law enforcement and other appropriate public service employment;
- (8) placement in suitable employment;
- (9) DSB Rehabilitation Center services including transportation and training supplies contingent on an individual's participation in the center program;
- (10) extended evaluation services;
- (11) diagnostic transportation;
- (12) on the job training;
- (13) training and associated maintenance and transportation costs for Business Enterprises Program Trainees;
- (14) upward mobility training and associated maintenance and transportation costs for Business Enterprises Program Trainees;
and
- (15) equipment and initial stocks and supplies for state owned (Randolph-Sheppard) vending stands.

(c) The following services will be provided by the Division of Services for the blind and conditioned on economic need:

- (1) Physical and mental restoration services (medical services other than diagnostic);
- (2) maintenance;
- (3) transportation, except where necessary in connection with determination of eligibility or nature and scope of services;
- (4) services to members of a handicapped individual's family necessary to the adjustment or rehabilitation of the handicapped individual;
- (5) telecommunications, sensory, and other technological aids and devices;
- (6) post-employment services necessary to assist handicapped individuals to maintain suitable employment except for those services not conditioned on economic need listed in (b) of this Rule;
- (7) occupational licenses;
- (8) tools, equipment, and initial stocks (including livestock) and supplies; and necessary shelters in connection with the foregoing items;
- (9) expenditures for short periods of medical care for acute conditions arising during the course of vocational rehabilitation, which, if not cared for, will constitute a hazard to the achievement of the vocational rehabilitation objective;
- (10) books and other training materials;
- (11) other goods and services not contraindicated by the act, which can reasonably be expected to benefit a handicapped individual in terms of his employability.

(d) The Division of Services for the Blind will maintain a written standard for measuring the financial need of clients with respect to normal living requirements and for determining their financial ability to meet the cost of necessary rehabilitation services, and for determining the amount of agency supplementation required to procure the necessary services.

(e) The policies will be reasonable and will be applied uniformly so that equitable treatment is accorded all handicapped individuals in similar circumstances.

Authority G.S. 111-28; 34 C.F.R. 361.47.

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHR/Division of Medical Assistance intends to adopt rule cited as 10 NCAC 26N .0201.

The proposed effective date of this action is June 1, 1993.

Instructions on How to Demand a Public Hearing (must be requested in writing within 15 days of notice):

Written comments concerning this amendment contact Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC 27603 Attn: Clarence Ervin, APA Coordinator.

Reason for Proposed Action: This Rule incorporates by reference the Standards of Practice for the DUR Program.

Comment Procedures: Written comments concerning this amendment must be submitted by April 1, 1993, to: Division of Medical Assistance, 1985 Umstead Drive, Raleigh, NC 27603 ATTN: Clarence Ervin, APA Coordinator. A fiscal impact statement is available upon written request from the same address.

CHAPTER 26 - MEDICAL ASSISTANCE

SUBCHAPTER 26N - DRUG USE REVIEW BOARD

SECTION .0200 - PROSPECTIVE DRUG REVIEW

.0201 PATIENT COUNSELING

The rules regarding the prospective DUR as established by the NC Board of Pharmacy at 21 NCAC 46 .2504 are applicable to Medicaid, which is incorporated by reference with subsequent amendments. A copy 21 NCAC 46 .2504 can be obtained from the N.C. Board of Pharmacy. There is no charge for single copies.

Statutory Authority: G.S. 108A-68; Social Security Act Section 1927(g).

TITLE 12 - DEPARTMENT OF JUSTICE

Notice is hereby given in accordance with G.S. 150B-21.2 that the Criminal Justice Standards Division - Department of Justice intends to amend rules cited as 12 NCAC 21 .0101 - .0103, .0202, .0204 - .0206, .0208, .0301, .0304 - .0305; adopt rules cited as 12 NCAC 21 .0104, .0203, .0210 - .0214, .0306.

The proposed effective date of this action is July 1, 1993.

The public hearing will be conducted at 10:00 a.m. on April 2, 1993 at the Independent Insurance Agents of North Carolina, Inc., Basement Classroom, 1506 Hillsborough Street, Raleigh, North Carolina 27605.

Reason for Proposed Actions: Need to meet new requirements of Chapter 74E of the General Statutes of North Carolina.

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments from March 1, 1993 to April 2, 1993. Such written comments must be delivered or mailed to the Criminal Justice Standards Division, P.O. Drawer 149, Raleigh, N.C. 27602-0149.

Editor's Note: The agency wishes to adopt a new 12 NCAC 21 .0203 and renumber rules 12 NCAC 21 .0203 to .0204; .0204 to .0205; .0205 to .0206; .0207 to .0208.

CHAPTER 2 - OFFICE OF THE ATTORNEY GENERAL

SUBCHAPTER 2I - COMPANY AND RAILROAD POLICE

SECTION .0100 - GENERAL PROVISIONS

.0101 LOCATION

The administrative office of for the commissioning of company and railroad police officers and the certification of company police agencies is located in the office of the Criminal Justice Standards

Division. Correspondence should be directed to:
Company Police Administrator
Criminal Justice Standards Division
Post Office Drawer 149
Raleigh, North Carolina 27602-0149
Telephone: (919) 733-2530

Statutory Authority G.S. 74E.

.0102 PURPOSES

The purposes of the Attorney General's Office in granting company ~~and railroad~~ police commissions are:

- (1) ~~to allow those organizations and corporations described in G.S. 74A-1 to employ individuals who possess full arrest authority, and~~
- (2) ~~to raise the level of competence of company and railroad police by establishing minimum standards for obtaining a police commission.~~
- (1) to allow those organizations and corporations described in G.S. 74E-2 to apply for certification as a company police agency;
- (2) to allow those organizations and corporations described in G.S. 74E-2 to employ individuals commissioned as company police officers pursuant to G.S. 74E-6; and
- (3) to ensure the integrity, proficiency, and competence of company police officers and establishing minimum standards for obtaining and maintaining both company police officer commissions and company police agency certifications.

Statutory Authority G.S. 74E-2; 74E-6.

.0103 ADMINISTRATIVE STAFF

The administrative staff responsible for company ~~and railroad~~ police commissions and company police agency certifications consists of assigned personnel from the Criminal Justice Standards Division. The duties of this staff are to carry out the policies of the law and regulations herein and to actively police the individuals already commissioned as company police officers to assure compliance with the law in all respects.

Statutory Authority G.S. 74E-4.

.0104 DEFINITIONS

In addition to any definitions set forth in G.S. 74E, the following definitions will apply through-

out this Chapter, unless the context clearly defines otherwise:

- (1) "Agency Records" means those records specified pursuant to this Subchapter and that documentation required to be maintained and compiled under the requirements of G.S. 74E.
- (2) "Badge" means a shield bearing the title "Company Police Officer" and the name of the agency and the officer's issued identification card provided by the Attorney General which identifies the individual as a company police officer.
- (3) "Calendar Year" shall be defined solely for the purposes of in-service training as a period beginning January 1 and ending on December 31.
- (4) "Certification" means:
 - (a) company police officers - the authority granted by the North Carolina Criminal Justice Education and Training Standards Commission to those individuals who meet the minimum requirements as a sworn law enforcement officer pursuant to Title 12, Chapter 9B of the North Carolina Administrative Code.
 - (b) company police agency - the authority granted by the Attorney General to those Company Police agencies who meet the minimum requirements established for such agencies pursuant to this Chapter.
- (5) "Commission" as it pertains to criminal offenses, means a finding by an administrative body, pursuant to the provisions of G.S. 150B, that a person performed the acts necessary to satisfy the elements of a specified criminal offense.
- (6) "Commissioned company police officer" means those individuals authorized by the Company Police Administrator to exercise all law enforcement powers within the constraints provided in G.S. 74E and classified as a company police officer pursuant to G.S. 74E-6(b).
- (7) "Company Police Administrator" means the individual who serves as the head of the administrative staff to whom the Attorney General designated the authority to act upon any company police agency commission or company police agency certification pursuant to the provisions of G.S. 74E and the rules promulgated thereunder. Said administrator is responsible for the individual officer's or

agency's compliance with the Company Police Act.

- (8) "Company Police Agency" means any public or private entity, association, corporation or company as defined by G.S. 74E-2(b).
- (9) "Conviction or convicted" means and includes, for the purposes of this Chapter, the entry of:
 - (a) a plea of guilty;
 - (b) a verdict or finding of guilty by a jury, judge, magistrate, or other duly constituted, established, and recognized adjudicating body, tribunal, or official, either civilian or military; or
 - (c) a plea of no contest, nolo contendere, or the equivalent.
- (10) "Department Head" means the chief administrator of any company police agency. The Department Head is to include the Company Police Chief or a designee formally appointed in writing by the Department Head, who shall hold and maintain a commission as a company police officer.
- (11) "Felony" means any offense designated a felony by the laws, statutes, or ordinances of the jurisdiction in which the offense occurred.
- (12) "High School" means a school accredited as a high school by:
 - (a) the Department or Board of Education of the state in which the high school is located; or
 - (b) the recognized regional accrediting body; or
 - (c) the state university of the state in which the high school is located.
- (13) "In-Service Training" means any and all training as prescribed in 12 NCAC 21 .0202 which must be satisfactorily completed by company police officers, in accordance with the standards established therein, during each full calendar year of commissioning as a company police officer.
- (14) "Insurance Carrier" means any entity, corporation, company or professional association as defined in G.S. 58 and who is authorized by the North Carolina Commissioner of Insurance to do business in North Carolina as an insurance carrier or underwriter.
- (15) "Misdemeanor" means those criminal offenses not classified under the laws,

statutes, or ordinances as felonies. Misdemeanor offenses are classified by the Criminal Justice Education and Training Standards Commission.

(a) "Class A Misdemeanor" means an act committed or omitted in violation of any common law, duly enacted ordinance, criminal statute, or criminal traffic code of this state, or any other jurisdiction, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of not more than six months. Specifically excluded from this grouping of "Class A misdemeanor" criminal offenses are motor vehicle or traffic offenses designated as misdemeanors under G.S. 20 (Motor Vehicles), similar laws of other jurisdictions, or duly enacted ordinances of an authorized governmental entity with the exception of the offense of impaired driving (G.S. 20-138.1) which expressly included herein as a Class A Misdemeanor, if the defendant was sentenced under punishment level three [G.S. 20-179(i)], level four [G.S. 20-179(j)], or level five [G.S. 20-179(k)].

(b) "Class B Misdemeanor" means an act committed or omitted in violation of any common law, criminal statute, or criminal traffic code of this state, or any other jurisdiction, either civil or military, for which the maximum punishment allowable for the designated offense under the laws, statutes, or ordinances of the jurisdiction in which the offense occurred includes imprisonment for a term of more than six months but not more than two years. Specifically excluded from this grouping of "Class B misdemeanor" criminal offenses are motor vehicles or traffic offenses designated as being misdemeanors under G.S. 20 (Motor Vehicles) or similar laws of other jurisdictions with the following exceptions. Class B misdemeanor does expressly include, either first or subsequent offenses of G.S. 20-138(a) or (b), G.S. 20-139 (persons under

influence of drugs), G.S. 20-28(b) (driving while license permanently revoked or permanently suspended), and G.S. 20-166 (duty to stop in event of accident). This definition further includes a violation of G.S. 20-138.1 (impaired driving), if the defendant was sentenced under punishment level one [G.S. 20-179(g)] or punishment level two [G.S. 20-179(h)] for the offense.

(16) "Polygraph Examination" means an examination requested by the Company Police Administrator of all new and probationary company police applicants during the application process. This examination will be conducted by the State Bureau of Investigation and the results will be forwarded to the Company Police Administrator. In addition, the Company Police Administrator may require that a polygraph examination be administered to transfer applicants holding general certification or currently commissioned company police officers, as deemed necessary.

Statutory Authority G.S. 74E.

SECTION .0200 - COMMISSIONING

.0202 MINIMUM STANDARDS FOR COMMISSIONING COMPANY POLICE

Persons eligible for a company police commission on the basis of their employment as prescribed in G.S. 74A-4 and 74E-4, must meet the following requirements before a Commission company police commission will be granted:

- (1) be a legal resident of North Carolina;

~~Note: This Rule does not apply to an applicant who is employed by a railroad company when such railroad company is engaged in interstate trips through this State and the applicant is employed by the railroad company as a railroad policeman.~~

- (2) be a high school graduate or have passed the General Educational Development Test indicating high school equivalency; A specific exception to this educational requirement is granted to:
 - (a) an applicant who was the holder of a valid company police commission on June 30, 1972; or

- (b) an applicant properly certified as a law enforcement officer by the Criminal Justice Education and Training Standards Commission on March 14, 1973.
- In either case, the exception will not be applicable if the applicant has had more than a 12 month break in service;
- (3) have attained a score of not less than 80 percent on a written examination of basic knowledge of laws of arrest, search, and investigation, and of these Rules to be administered by a representative of the North Carolina Department of Justice;
- Note:** All examination questions will be based on the book Arrest, Search, and Investigation ~~which is~~ as published by and available from the Institute of Government, the University of North Carolina at Chapel Hill, Chapel Hill, North Carolina 27514, and these Rules.
- Applicants will be advised in writing of test dates and sites at least five days prior to the examination. In the event an applicant fails to successfully complete the examination, only one re-test will be allowed. Upon an applicant's failure to complete the second test, the applicant will be ineligible to apply for or receive a company police commission for a period of one year from the date of the second unsuccessful completion;
- (4) meet the minimum standards for state law enforcement officers established by the North Carolina Criminal Justice Education and Training Standards Commission, appearing in Title 12, Chapter 9 of the North Carolina Administrative Code; which Standards are hereby ~~adopted~~ incorporated by reference, and shall automatically include any later amendments and editions of the ~~adopted matter as authorized by G. S. 150B-14(e)~~ referenced material.
- (5) applicants who do not hold ~~General Certification~~ general certification as a law enforcement officer issued by the Criminal Justice Education and Training Standards ~~Division~~ Commission or the North Carolina Sheriff's Education and Training Standards Commission, must submit to and successfully complete a polygraph examination administered by

- the State Bureau of Investigation; ;
- (6) be a citizen of the United States;
- (7) be at least 20 years of age;
- (8) have produced a negative result on a drug screen administered according to the following specifications:
- (a) the drug screen shall be a urine test consisting of an initial screening test using an immunoassay method and a confirmatory test on an initial positive test result using a gas chromatography mass spectrometry (GC/MS) or other reliable initial and confirmatory tests as may, from time to time, be authorized or mandated by the Department of Health and Human Services for Federal Workplace Drug Testing Programs;
- (b) a chain of custody shall be maintained on the specimen from collection to the eventual discarding of the specimen;
- (c) the drugs whose use shall be tested for shall include at least cannabis, cocaine, phencyclidine (PCP), opiates and amphetamines or their metabolites;
- (d) the test threshold values established by the Department of Health and Human Services for Federal Workplace Drug Testing Programs are hereby incorporated by reference, and shall automatically include any later amendments and editions of the referenced material;
- (e) the test conducted shall be not more than 60 days old, calculated from the time when the laboratory reports the results to the date of employment;
- (f) the laboratory conducting the test must be certified for federal workplace drug testing programs, and must adhere to applicable federal rules, regulations and guidelines pertaining to the handling, testing, storage and preservation of samples, except that individual agencies may specify other drugs to be tested for in addition to those drugs set out in Item (8) of this Rule; and
- (g) every agency head shall be responsible for making adequate arrangements for the services of a Medical Review officer (MRO) for the purpose of review of drug tests reported by the laboratory and such officer shall be a licensed physician;
- (9) notify the Company Police Administrator in writing of all criminal offenses for

which the officer is arrested, pleads no contest, pleads guilty, or is found guilty of. This shall include all criminal offenses except minor traffic offenses and shall specifically include any offense of Driving Under the Influence (DUI) or Driving While Impaired (DWI). A minor traffic offense is defined, for purposes of this Item, as an offense where the maximum punishment allowable is 60 days or less. The notifications required must specify the nature of the offense, the court in which the case was handled and the date of the conviction. The notifications must be received by the Company Police Administrator within 30 days of the date of the case disposition. Officers required to notify the Company Police Administrator under this Item shall also make the same notification to their Department Head within 20 days of the date the case was disposed of in court. The Department Head, provided he had knowledge of the officer's conviction(s), shall also notify the Company Police Administrator of all criminal convictions within 30 days of the date the case was disposed of in court. Receipt by the Company Police Administrator of a single notification, from either the officer or the Department Head, is sufficient notice for compliance with this Item. However, the notification to the Company Police Administrator does not excuse the officer from making an independent notification otherwise required by either the Criminal Justice Education and Training Standards Commission or the Sheriffs' Education and Training Standards Commission;

- (10) be of good moral character;
- (11) not having committed or been convicted of a crime or crimes as specified in 12 NCAC 21 .0211(b), such that the applicant would be ineligible for commissioning as a Company Police officer.

Statutory Authority G.S. 74E-4.

.0203 APPLICATION FOR COMPANY POLICE AGENCY

Each company police agency shall complete and submit to the Company Police Administrator the following items and documentation:

- (1) an application form;
- (2) articles of incorporation, partnership agreements or other agency originating documentation, which specifies the agency's law enforcement functions;
- (3) names and addresses for all corporate officers, partners and all agents associated with the corporation or partnership;
- (4) a copy of the company police agency's insurance policy, or if self insured, the certificate of self insurance (applicable to non-public entities only);
- (5) statements indicating the results of a criminal history record check on each principal or agent of the public or private entity, corporation or partnership, through the clerk of superior court in each county where the individual resided or maintained a residence or place of business over a five year period prior to such application;
- (6) the appropriate fees as required by 12 NCAC 21 .0206.

Statutory Authority G.S. 74E.

~~.0203~~ .0204 APPLICATION FOR COMPANY POLICE OFFICER

~~(a) Each company, agency or institution which employs company police officers shall be registered with the Company Police Administrator. In order to be registered, each company, agency or institution which desires to employ company police officers shall give written notice of that intent to the Company Police Administrator. Incorporated companies shall also submit copies of their articles of incorporation.~~

~~(b) Each application for a company police commission shall be submitted to the Company Police Administrator and must contain the following:~~

The application for a company police officer must contain:

- (1) a written request from the chief executive officer Department Head of the company, agency or institution requesting that a company police commission be issued to the applicant. An oral request will not satisfy this requirement; and
- (2) if the applicant holds General Certification general certification issued by the North Carolina Criminal Justice Education and Training Standards Commission or the North Carolina

Sheriff's Education and Training Standards Commission, the application must contain the following:

- (a) ~~(A)~~ Medical History Statement (Form F-1);
 - (b) ~~(B)~~ Medical Examination Report (Form F-2);
 - (c) ~~(C)~~ Two complete fingerprint cards;
 - (d) ~~(D)~~ Two recent 1" x 1-1/4" (non-polaroid) close-up color photographs (not more than three months old);
 - (e) ~~(E)~~ Satisfactory proof of a negative drug screen;
 - (f) ~~(F)~~ Satisfactory proof of ~~successful completion of annual in-service firearms requalification training; all in-service training requirements specified by the North Carolina Criminal Justice Education and Training Standards Commission, which standards are hereby incorporated by reference and shall automatically include any later amendments and editions of the referenced material;~~
 - (g) ~~(G)~~ Authorization for release of records (CP-1);
 - (h) ~~(H)~~ Drug Screen Consent Form (CP-2); ~~or~~
 - (i) Appropriate fees as specified in 12 NCAC 2I .0206;
 - (j) An appropriate background investigation as specified in 12 NCAC 2I .0205 (Form F-8); and
 - (k) Personal History Statement (Form F-3) (not more than three months old); or
- (3) if the applicant does not hold ~~General Certification~~ general certification, the application must contain the following:
- (a) ~~(A)~~ Medical History Statement (Form F-1);
 - (b) ~~(B)~~ Medical Examination Report (Form F-2);
 - (c) ~~(C)~~ Personal History Statement (not more than three months old), (Form F-3);
 - (d) ~~(D)~~ Report of Qualification Appraisal Interview (Form F-4);
 - (e) ~~(E)~~ Proof of High School graduation or GED;
 - (f) ~~(F)~~ Two complete fingerprint cards;
 - (g) ~~(G)~~ Two recent 1" x 1-1/4" (non-polaroid) close-up color photographs (not more than three months old);

- (h) ~~(H)~~ Proof of satisfactory completion of a Criminal Justice Education and Training Standards Commission accredited basic law enforcement training course;
- (i) ~~(I)~~ Satisfactory proof of a negative drug screen;
- (j) ~~(J)~~ Authorization for Release of Records (CP-1);
- (k) ~~(K)~~ Drug Screen Consent Form (CP-2);
- (l) Appropriate fees as specified in 12 NCAC 2I .0206; and
- (m) Background investigation as specified in 12 NCAC 2I .0205 (Form F-8).

Statutory Authority G.S. 74E.

.0204 .0205 BACKGROUND INVESTIGATION

~~A background investigation of each applicant will be conducted by the State Bureau of Investigation. An application will be denied upon a finding that the applicant:~~

- ~~(1) committed some act which constitutes dishonesty or fraud;~~
- ~~(2) committed a crime involving the infliction of injury to another person;~~
- ~~(3) lacks good moral character, has intemperate habits or lacks truth, honesty, and integrity;~~
- ~~(4) committed a felony or some other crime involving moral turpitude or involving the illegal use, carrying or possession of a dangerous weapon;~~
- ~~(5) made any false statement or gave any false information in connection with the application.~~

(a) Any company police agency contemplating the commissioning of an applicant as a company police officer shall, prior to employment, complete a background investigation on such applicant. The investigation shall examine the applicant's character traits and habits relevant to performance as a company police officer and shall determine whether the applicant is of good moral character. The investigation shall be submitted to the Company Police Administrator utilizing the Commission-approved Form F-8 (Summary of Background Investigation).

(b) Prior to the investigation, the applicant shall complete a Personal History Statement (Form F-3) to provide a basis for the investigation.

(c) The Department Head shall conduct the applicant's background investigation. The

Department Head shall document the results of the investigation and shall include in the report of investigation:

- (1) biographical data;
- (2) family data;
- (3) scholastic data;
- (4) employment data;
- (5) interviews with the applicant's references; and
- (6) a summary of the Department Head's findings and conclusions regarding the applicant's moral character.

(d) The agency may use the method of documenting the results of the background investigation it deems most appropriate to its needs. However, the company police program's "Summary of Background Investigation" form should be used as a guide for minimum information collected and recorded by the investigator.

(e) In the event that an individual applying for commission as a company police officer is the Department Head, he shall not conduct his own background investigation. The investigation must be performed by a city or county agency in the county where the company police agency has residency; or contract with a private investigator.

Statutory Authority G.S. 74E-4.

.0205 .0206 FEE

Upon notification that the application has been approved, the applicant shall forward a check in the amount of five dollars (\$5.00) made out to the North Carolina Department of Justice, Criminal Justice Standards Division to:

Director, North Carolina Criminal Justice Education and

Training Standards Commission

P.O. Drawer 149

Raleigh, North Carolina 27602

(a) Upon notification that an application for a company police agency certification or a company police officer commission has been approved, the applicant shall forward a certified check or money order made out to the North Carolina Department of Justice to the:

Company Police Administrator

Criminal Justice Standards Division

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(b) The following fees shall be due and payable prior to the issuance of company police agency certification or a company police officer commission.

- (1) Application for certification as a company police agency - \$250.00.
- (2) Annual renewal of certification as a company police agency - \$200.00.
- (3) Application for reinstatement of certification as a company police agency - \$1,000.00.
- (4) Application for commission as a company police officer - \$100.00.
- (5) Annual renewal of commission as a company police officer - \$50.00.
- (6) Application for reinstatement of commission as a company police officer - \$150.00.

Statutory Authority G.S. 74E-12.

.0207 .0208 OATH

Every ~~police~~ company police officer so appointed shall, before entering upon the duties of his office, take and subscribe to the oath provided for in G.S. 11-11 before an officer authorized by G.S. 11-7.1 to administer oaths, and shall forward a copy of the executed oath within 10 days of the day on which the oath is subscribed to the Company Police Administrator.

Statutory Authority G.S. 11-11; 74E-4.

.0210 LIABILITY INSURANCE

(a) Any applicant for a non-public company police agency certification must file with the Company Police Administrator, either a copy of the liability insurance policy or a certificate of self insurance, at the following address:

Company Police Administrator

Criminal Justice Standards Division

Post Office Drawer 149

Raleigh, North Carolina 27602-0149

(b) Any notice of cancellation by an insurance carrier shall be delivered by certified mail, return receipt requested, to the following address:

Company Police Administrator

Criminal Justice Standards Division

Post Office Drawer 149

Raleigh, North Carolina 27602-0149

Statutory Authority G.S. 74E-3.

.0211 SUSPENSION, REVOCATION OR DENIAL OF AGENCY CERTIFICATION

(a) A company police agency certification may be suspended, revoked or denied upon a finding that the agency has:

- (1) failed to pay any required fees;
- (2) failed to produce or maintain a copy of a liability insurance policy or a certificate of self insurance;
- (3) failed to meet any of the requirements for certification provided in 12 NCAC 21 .0203;
- (4) failed to provide any of the required documentation pursuant to 12 NCAC 21 .0203;
- (5) failure to allow for the reasonable inspection of the Company Police agency records pursuant to G.S. 74E-4(3);
- (6) failure to ensure compliance by the agency's company police officers of any and all in-service training requirements as specified by 12 NCAC 21 .0202;
- (7) failure to submit the required in-service training compliance reports as required by 12 NCAC 21 .0202;
- (8) failure to submit any and all reports, notification or other information required or requested by the Company Police Administrator;
- (9) knowingly made a material misrepresentation of any information required for certification or commissioning from the Company Police Administrator or the North Carolina Criminal Justice Education and Training Standards Commission or the North Carolina Sheriff's Education and Training Standards Commission;
- (10) has knowingly and willfully by any means of false pretense, deception, defraudation, misrepresentation or cheating whatsoever, obtained or attempted to obtain credit, training, certification or commissioning from the Company Police Administrator of the North Carolina Criminal Justice Education and Training Standards Commission or the North Carolina Sheriff's Education and Training Standards Commission by means of deceit, fraud or misrepresentation; or
- (12) failure to ensure that any employee not

commissioned as a company police officer is not violating a prohibition set forth in 12 NCAC 21 .0304.

(b) An agency whose certification has been suspended, revoked, or denied may appeal the action in accordance with the provisions of G.S. 150B.

Statutory Authority G.S. 74E-4.

.0212 SUSPENSION, REVOCATION, OR DENIAL OF OFFICER COMMISSION

(a) A company police commission shall be revoked or denied upon a finding that the officer has committed or been convicted of:

- (1) any felony (unless pardoned by the President of the United States or a state Governor); or
- (2) any crime for which the authorized punishment could have been imprisonment for more than two years.

(b) The Attorney General, or his designee, may revoke, suspend, or deny the commission of a company police officer when the Company Police Administrator finds that the applicant for commission or the commissioned company police officer has committed or been convicted of:

- (1) a crime or unlawful act as defined in 12 NCAC 21 .0104(15)(b) as a Class B misdemeanor and which occurred after the date of initial certification;
- (2) a crime or unlawful act as defined in 12 NCAC 21 .0104(15)(b) as a Class B misdemeanor within a five-year period prior to the date of application for certification;
- (3) four or more crimes or unlawful acts as defined in 12 NCAC 21 .0104(15)(b) as Class B misdemeanors regardless of the date of commission or conviction;
- (4) four or more crimes or unlawful acts as defined in 12 NCAC 21 .0104(15)(a) as a Class A misdemeanor, each of which occurred after the date of initial certification; or
- (5) four or more crimes or unlawful acts as defined in 12 NCAC 21 .0104(15)(a) as a Class A misdemeanor except the applicant may be certified if the last conviction or commission occurred more than two years prior to the date of the application for certification.

(c) In addition, a company police commission shall be revoked or denied upon a finding that the officer:

- (1) lacks good moral character;
- (2) fails to meet any of the required minimum standards as specified in 12 NCAC 2I .0202;
- (3) has been terminated from employment with the company police agency for which the officer is commissioned;
- (4) has committed any act prohibited by 12 NCAC 2I .0304; or
- (5) termination, suspension, or revocation of the certification of the company police agency with which the officer is commissioned.

(d) An officer whose certification has been suspended, revoked, or denied may appeal the action in accordance with the provisions of G.S. 150B.

Statutory Authority G.S. 74E-4.

.0213 PERIOD OF SUSPENSION, REVOCATION OR DENIAL

(a) When the Attorney General, or his designee, revokes or denies the Commission of a company police officer, the sanction shall be permanent where the cause of sanction is:

- (1) commission or conviction of a felony;
- (2) commission or conviction of a crime for which authorized punishment included imprisonment for more than two years; or
- (3) the second suspension of an officer's commission for any of the causes requiring a five-year period of suspension.

(b) When the Attorney General, or his designee, suspends or denies the commission of a company police officer, the period of sanction shall not be less than five years. However, the Attorney General, or his designee, may either reduce or suspend the period of sanction under 12 NCAC 2I .0212(b) or substitute a period of probation in lieu of suspension of a commission following an administrative hearing, where the cause of sanction is:

- (1) commission or conviction of a crime other than those listed in Paragraph (a) of this Rule;
- (2) refusal to submit to the applicant or lateral transferee drug screen required by 12 NCAC 2I .0202(8);
- (3) production of a positive result on a drug screen reported to the Company Police Administrator where the positive result cannot be explained to the Company Police Administrator's satisfac-

tion;

- (4) material misrepresentation of any information required for company police commissioning;
- (5) obtaining, attempting to obtain, aiding another person to obtain, or aiding another person attempting to obtain credit, training or commissioning as a company police officer by any means of false pretense, deception, defraudation, misrepresentation or cheating; or
- (6) failure to make either of the notifications as required by 12 NCAC 2I .0202(9).

(c) When the Attorney General, or his designee, suspends or denies the commission of a company police officer, the period of sanction shall be for an indefinite period, but continuing so long as the stated deficiency, infraction, or impairment continues to exist, where the cause of sanction is:

- (1) failure to meet or satisfy all basic training requirements;
- (2) failure to meet or maintain the minimum standards of employment;
- (3) discharge from a criminal justice agency for impairment of physical or mental capabilities; or
- (4) failure to meet the in-service training requirements as prescribed by the North Carolina Criminal Justice Education and Training Standards Commission.

Statutory Authority G.S. 74E-4.

.0214 SUMMARY SUSPENSIONS

(a) The Company Police Administrator through designation by the Attorney General, may summarily suspend the commission of the company police officer before the commencement of proceedings for suspension or revocation of the certification when, in the opinion of the Company Police Administrator, the public health, safety, or welfare requires this emergency action of summary suspension. The Company Police Administrator has determined that the following conditions specifically affect the public health, safety, or welfare, and therefore, the Company Police Administrator may utilize summary suspension when:

- (1) the person has committed or been convicted of a violation of the criminal code which would require a permanent revocation or denial of certification; or
- (2) the commissioned company police officer fails to satisfactorily complete

the minimum in-service training requirements as prescribed in Title 12, Chapter 9 of the North Carolina Administrative Code.

(b) A summary suspension shall be effective on the date specified in the order of the summary suspension or upon the service of the certified copy of the order at the last known address of the person, whichever is later. The summary suspension shall remain in effect during the proceedings.

(c) Upon verbal notification by the Company Police Administrator that the company police commission of any officer is being summarily suspended by written order, the Department Head of the company police agency shall take such steps as are necessary to ensure that the officer does not perform duties requiring a company police commission through the Attorney General.

Statutory Authority G.S. 74E-4; 74E-10.

SECTION .0300 - CONDUCT OF COMMISSIONED POLICEMEN

.0301 TENURE

A company police officer commission or company police agency certification shall remain in effect until:

- (1) The Attorney General directs termination;
- (2) The company police officer employee ceases to be employed ~~as a police officer by a company or institution which can employ company or railroad police by a company police agency;~~
- (3) ~~The surety bond expires or is cancelled;~~ The required liability insurance is terminated or suspended by the agency's insurance carrier;
- (4) The need for a commission no longer exists;
- (5) Evidence is presented that the person has committed an act which would have originally caused denial of the application or an act prohibited by Rule .0304 of this Section; or
- (6) The Criminal Justice Education and Training Standards Commission suspends or revokes an officer's certification for cause.

Statutory Authority G.S. 74E-4; 74E-6; 74E-10.

.0304 PROHIBITED ACTS

In addition to the prohibited acts set forth else-

where in these ~~Regulations~~ Rules and in Chapter 74A 74E, the following acts are prohibited and may result in civil or criminal action or both:

- (1) use of excess force while ~~making an arrest in the performance of their official duties;~~
- (2) carrying a concealed weapon except:
 - (a) when on his own business property or at home;
 - (b) when employed as ~~private police by the administration or board of trustees of any public or private institution of higher education, while acting in the discharge of those duties, and while on property owned, used, or operated by a school, college, or university as a part of the education institution; and a company police officer, while on-duty and acting in the discharge of his official duties and while within those property jurisdiction limitations specifically set forth and described under G.S. 74E-6;~~
 - ~~(c) when employed as railroad police and in the performance of their official duties;~~
- (3) activating or operating a red light in or on any vehicle in this State unless such vehicle is exempted from the provisions of G.S. 20-130.1(b);
- (4) activating or operating a blue light in or on any vehicle in this State except:
 - (a) when operating a motor vehicle used primarily by company or railroad police in the performance of their official duties; ~~and~~
 - (b) when in property jurisdiction limitations specifically described under G.S. 74A-2 74E-6; or
 - ~~(c) when in hot pursuit as defined in G.S. 74A-2;~~
 - (c) when in continuous or immediate pursuit of a person for an offense committed upon real property owned by or in the possession or control of their employer or real property or in the possession and control of a person who has contracted with the employer to provide on-site police security personnel services for the property; or
 - (d) during the transportation of an arrestee, which the company police agency has taken into custody;
- (5) activating or operating a siren when operating a any motor vehicle used primarily by any company ~~or railroad~~ police

- agency in the performance of their official duties when off outside of the property jurisdiction limitations specifically described under G.S. 74A-2 74E-6 unless in ~~hot~~ immediate and continuous pursuit;
- (6) ~~represent~~ representing in any manner at any time that he is a federal, state, county, or municipal law enforcement officer, unless the company police officer is dually certified as one of the classifications listed in this Rule;
- (7) ~~impede~~ impeding traffic, ~~stop~~ stopping motorists or pedestrians, or in any manner ~~impose~~ imposing or ~~attempt~~ attempting to impose his will upon another person as police authority unless:
- (a) he is on the property specifically described under G.S. 74A-2 74E-6; or
- (b) ~~in hot pursuit; when in immediate and continuous pursuit of any person for an offense which occurred within the property jurisdiction limitations specifically described under G.S. 74E-6;~~
- (8) ~~use using~~ or ~~attempted~~ attempting to use ~~of~~ authority granted under a company police commission pursuant to this Subchapter outside the political boundaries of North Carolina; or
- (9) violating Rule .0306 of this Section.

Statutory Authority G.S. 74E-4; 74E-6.

.0305 TRANSFERS

No individual commissioned as a company ~~or railroad~~ policeman can transfer his company police commission from one employing company police agency to another.

Statutory Authority G.S. 74E-4; 74E-6.

.0306 BADGES, UNIFORMS, VEHICLES AND OFFICER IDENTIFICATION

(a) Badges:

- (1) All company police officers shall, when on duty, wear a badge bearing the name of the certified company police agency and the title of:
- (A) Railroad Police officer; or
- (B) Campus Police Officer; or
- (C) Special Police Officer.
- (2) The badge is to be carried at all times by the company police officer. The badge shall always be worn in plain view, except in situations where the officer's weapon is concealed under the

provisions set forth in Rule .0304 of this Section.

- (3) No identification card shall be issued to or possessed by any company police officer except in the form of identification issued to the officer by the Attorney General.

(b) Uniforms:

- (1) All company police officers shall, when on duty, wear the uniform of the company police agency unless directed to wear other attire by the Department Head.
- (2) When wearing civilian attire, the company police officer shall comply with 12 NCAC 21 .0306(a).
- (3) Those company police agencies which employ both company police commissioned and non-commissioned security personnel shall provide the commissioned company police officers with a uniform of a different color that would clearly distinguish the company police officer from other employees of the agency.
- (4) The uniform of the company police officer shall bear shoulder patches that contain:
- (A) the terms "Railroad Police Officer," "Campus Police Officer," or "Special Police Officer"; and
- (B) the name of the company police agency.

(c) Vehicles:

- (1) If the company police agency utilizes any vehicle bearing any insignia, such insignia must clearly designate the name of the company police agency and the classification of the company police officers who will operate this vehicle.
- (2) While such insignia is displayed, the Department Head shall ensure that no employees non-commissioned as company police officers operate the marked vehicle.
- (3) The Department Head shall ensure that no employee non-commissioned as a company police officer operate any company police vehicle with a blue light contained therein.
- (4) The Department Head shall ensure that any vehicle displaying the company police agency insignia is not operated outside of those property jurisdiction limitations set forth in G.S. 74E-6.

Statutory Authority G.S. 74E-7.

TITLE 13 - DEPARTMENT OF LABOR

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Labor intends to amend rule cited as 13 NCAC 7C .0102 and repeal rules cited as 13 NCAC 7C .0105 - .0106, .0108 - .0109.

The proposed effective date of this action is June 1, 1993.

The public hearing will be conducted at 2:00 p.m. on March 16, 1993 at the Labor Building, Room 249, 4 West Edenton Street, Raleigh, North Carolina 27601.

Reason for Proposed Action: 13 NCAC 7C .0102 - To clarify the enforceability of 29 CFR 1926.28(a) as published in 37 Fed. Reg. 27510 (1972) and adopted by the North Carolina Department of Labor on July 1, 1973. **13 NCAC 7C .0105 and .0106** - To prevent duplication of inspections by OSHA and other divisions within the Department of Labor. **13 NCAC 7C .0108 and .0109** - Alternative enforcement procedures within other State Departments are sufficient.

Comment Procedures: People wanting to present oral testimony at the hearing should provide a written summary of the proposed testimony to the department by March 12, 1993. Written comments will be accepted until March 31, 1993. Direct all correspondence to Taylor McMillan, NC Department of Labor, 4 W. Edenton Street, Raleigh, NC 27601.

CHAPTER 7 - OSHA

SUBCHAPTER 7C - SAFETY AND HEALTH

SECTION .0100 - GENERAL INDUSTRY: CONSTRUCTION AND AGRICULTURE

.0102 CONSTRUCTION

(a) The commissioner has adopted the Occupational Safety and Health Regulations for Construction, Title 29 of the Code of Federal Regulations Part 1926.1-1926.1051 (commonly designated as 29 CFR 1926), as the same appears in Volume 30

of the Federal Register 22801-22893 (June 24, 1974), with the following additions, deletions and amendments:

- (1) Flooring requirements--29 CFR 1926.750, as amended in 39 FR (July 2, 1974), pages 23460-24361;
- (2) Recodification of air contaminant standards--29 CFR 1926.55, as amended in 40 FR (May 28, 1975), pages 23072-23074;
- (3) Recodification of air contaminant standards, correction--29 CFR 1926, as amended in 40 FR (June 3, 1975), page 23847;
- (4) National Electrical Code (ground fault circuit interrupters)--29 CFR 1910.309 and 29 CFR 1926.400, as amended in 41 FR (December 21, 1976), pages 55685-55704;
- (5) National Electrical Code (ground fault circuit interrupters); corrections--29 CFR 1910.309 and 1926.400 as amended in 42 FR (January 14, 1977), page 2956;
- (6) Marine operations and equipment--29 CFR 1926.605 as amended in 42 FR (July 22, 1977), page 37674;
- (7) Guardrails, handrails and covers, addition of a new Paragraph (g)--29 CFR 1926.500 as amended in 45 FR (November 14, 1980), page 75625 and adopted by the North Carolina Department of Labor on December 9, 1980;
- (8) Definitions applicable to 29 CFR 1926.500, addition of a new Paragraph (p)--29 CFR 1926.502 as amended in 45 FR (November 14, 1980), pages 75625 through 75626 and adopted by the North Carolina Department of Labor on December 9, 1980;
- (9) Addition of Appendix A to Subpart M for 1926.500(g)(1), Roof Widths--29 CFR 1926.500(g)(1) as amended in 45 FR (November 14, 1980), page 75626 and adopted by the North Carolina Department of Labor on December 9, 1980;
- (10) Revision of 1926.55 as published in 51 FR (June 20, 1986) page 22756 and adopted by the North Carolina Department of Labor on July 21, 1986;
- (11) Final rule for asbestos, tremolite, anthophyllite, and actinolite (1926.58) as published in 51 FR (June 20, 1986)

- page 22756 and adopted by the North Carolina Department of Labor on July 21, 1986;
- (12) Revision of 1926.151 as published in 51 FR (July 11, 1986) page 25318 and adopted by the North Carolina Department of Labor on December 8, 1986;
- (13) Revision of 1926.449 as published in 51 FR (July 11, 1986) page 25318 and adopted by the North Carolina Department of Labor on December 8, 1986;
- (14) Revision of 1926.351 as published in 51 FR (July 11, 1986) page 25318 and adopted by the North Carolina Department of Labor on December 8, 1986;
- (15) Revision of 1926.803 as published in 51 FR (July 11, 1986) page 25318 and adopted by the North Carolina Department of Labor on December 8, 1986;
- (16) Revision of Subpart K of Part 1926 as published in 51 FR (July 11, 1986) page 25318 and adopted by the North Carolina Department of Labor on December 8, 1986;
- (17) 1926.550:
 - (A) Revision as published in 52 FR (September 28, 1987) pages 36381-36382;
 - (B) Revision as published in 53 FR (August 2, 1988) pages 29139-29141;
 - (C) Redesignation of 1926.550(g)(3)(i)(D) to 1926.550(g)(3)(ii)(D) and Paragraphs (g)(3)(i)(E) through (g)(3)(i)(G) as Paragraphs (g)(3)(i)(D) through (g)(3)(i)(F) respectively as published at 54 FR (April 18, 1989) page 15406;
- (18) Revision of 1926.552 as published in 52 FR (September 28, 1987) pages 36381-36382;
- (19) Revision of 1926.903 as published in 52 FR (September 28, 1987) pages 36381-36382;
- (20) Revision of 1926.55 as published in 52 FR (December 4, 1987) page 46312;
- (21) Revision of 1926.700 as published in 53 FR (June 16, 1988) pages 22643-22644 and with amendments as published in 55 FR (October 18, 1990) page 42328;
- (22) Revision of 1926.701 as published in 53 FR (June 16, 1988) page 22644;
- (23) Revision of 1926.702 as published in 53 FR (June 16, 1988) page 22644;
- (24) Revision of 1926.703 as published in 53 FR (June 16, 1988) pages 22644-22645;
- (25) Revision of 1926.704 as published in 53 FR (June 16, 1988) page 22645;
- (26) Revision of 1926.705 as published in 55 FR (October 18, 1990) pages 42328-42329;
- (27) Revision of 1926.706 as published in 53 FR (June 16, 1988) page 22646;
- (28) Revision of 1926.58 as published in 53 FR 35627-35629 (September 14, 1988), and corrected in 53 FR (September 23, 1988) page 37080, amended as follows:
 - (A) In Paragraph (o)(1) change the effective date from October 14, 1988, to March 6, 1989;
 - (B) In Paragraph (o)(2) change the action date from January 16, 1987, to June 6, 1989;
 - (C) In Paragraph (o)(2)(i) change the action date from December 13, 1988, to May 6, 1989;
 - (D) In Paragraph (o)(2)(ii) change the action date from March 13, 1989, to August 6, 1989;
 - (E) In Paragraph (o)(2)(iii) change the action date from September 14, 1989, to February 6, 1990;
- (29) Revision of Subpart D of Part 1926 and amendment of Part 1926 by the addition of 1926.59 as published in 52 FR (August 24, 1987) pages 31877-31886;
- (30) Revision of 1926.800 as published in 54 FR (June 2, 1989) pages 23823-23857;
- (31) Revision of Subpart P as published in 54 FR (October 31, 1989) pages 45959-45991;
- (32) Amendment to 1926.305 as published in 55 FR (October 18, 1990) page 42328;
- (33) Revision and relocation of portions of Subpart L and Subpart M to new Subpart X as published in 55 FR (November 14, 1990) pages 47687-47691 and amended as published in 56 FR (January 23, 1991) page 2585, 56 FR (February 7, 1991) page 5061, 56 FR (August 23, 1991) pages 41793 and 41794;
- (34) Revision of 1926.58 as published in 57

- (35) FR (June 8, 1992) pages 24330-24331.
- (36) Revision of Subpart D as published in 57 FR (August 10, 1992) pages 35681-35695.
- (37) Revision of Subpart D as published in 57 FR (September 14, 1992) pages 42452-42463.
- (37) 1926.28(a) is amended to read as follows: (a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

(b) Copies of the standards are available for inspection at the offices of the division, and may be obtained either from the division or from the Federal Register, U.S. Government Printing Office, Washington, D.C. 20402.

Statutory Authority G.S. 95-131.

.0105 BOILERS AND PRESSURE VESSELS

(a) ~~All boilers and pressure vessels shall be operated and maintained in accordance with the rules set forth in 13 N.C.A.C. 13.~~

(b) ~~Copies of these rules may be obtained at the offices of the division, from the Boiler and Pressure Vessel Division, or from the Office of Administrative Hearings.~~

Statutory Authority G.S. 95-131.

.0106 ELEVATORS AND RELATED EQUIPMENT

(a) ~~All elevators and related equipment shall be operated and maintained in accordance with the rules set forth in 13 N.C.A.C. 15.~~

(b) ~~Copies of these rules may be obtained at the offices of the division, from the Elevator and Amusement Device Division, or from the Office of Administrative Hearings.~~

Statutory Authority G.S. 95-131.

.0108 BUILDING CODE

(a) ~~Except as specified in Paragraphs (b) and (e) of this Rule, all places of employment newly occupied after the effective date of this Rule shall be constructed, maintained, and occupied in accordance with the standards set out in Chapters 2 through 32 of the Standard Building Code of the Southern Building Code Congress International~~

~~(1991 edition) which is hereby incorporated by reference. This incorporation shall not include any subsequent amendments or editions of this code. Copies of this code may be obtained from the Southern Building Code Congress International, 900 Montclair Road, Birmingham, Alabama 35213-1206, for sixty dollars (\$60.00).~~

(b) ~~The Standard Building Code shall be subject to the following modifications:~~

- (1) ~~Section 2402.5. Standby Power. Add a sentence to read: "Hydraulic elevators which do not serve more than three floors shall be designed and installed with their own emergency power to complete the lowering process."~~
- (2) ~~Section 701.1.2, Table 700. Elevator shaft enclosures and elevator machine rooms shall have a two hour fire resistive rating and the opening protectives shall have a one and one-half hour fire resistive rating.~~
- (3) ~~Section 2402.6.3. Vents. Add a sentence to read as follows: "Vents may be closed when designed to be opened automatically if a smoke detector and heat detector located at the top of the hoistway is activated."~~

(e) ~~Historic buildings newly occupied as places of employment after the effective date of this Rule shall be constructed, maintained, and occupied in accordance with the provisions set out in Sections 1909 and 1910 of Volume I, General Construction, of the North Carolina State Building Code (1991 Edition), which are hereby incorporated by reference. This incorporation shall not include any subsequent editions or amendments to these sections. Copies of Volume I of the North Carolina State Building Code can be obtained from the North Carolina Department of Insurance, Code Council Section, Post Office Box 26387, Raleigh, NC 27611, for twenty five dollars (\$25.00).~~

Statutory Authority G.S. 95-126; 95-131; 95-136.

.0109 FIRE PREVENTION CODE

~~All places of employment shall be maintained and occupied in accordance with the standards set out in Chapters 2 through 43 of the Standard Fire Prevention Code of the Southern Building Code Congress International (1991 edition) which is hereby incorporated by reference. This incorporation shall not include any subsequent amendments or editions of this code. Copies of this code may be obtained from the Southern~~

~~Building Code Congress International, 900
Montclair Road, Birmingham, Alabama
35213-1206, for forty five dollars (\$45.00).~~

Statutory Authority G.S. 95-126; 95-131; 95-136.

**TITLE 15A - DEPARTMENT OF
ENVIRONMENT, HEALTH, AND
NATURAL RESOURCES**

Notice is hereby given in accordance with G.S. 150B-21.2 that the EHNR - DEM/Air Quality intends to amend rule cited as 15A NCAC 2H .0610.

The proposed effective date of this action is September 1, 1993.

The public hearing will be conducted:

March 16, 1993

7:00 pm

Groundfloor Hearing Room
Archdale Building
512 North Salisbury Street
Raleigh, North Carolina

March 17, 1993

7:00 pm

Criminal Superior Court Room
Old Courtroom Building- 2nd Floor
130 South Queen Street
Kinston, North Carolina

March 24, 1993

7:00 pm

Catawba Valley Community College Auditorium
2550 Highway 70 South East
Hickory, North Carolina

Reason for Proposed Action: To integrate the new federal air toxic program of maximum achievable control technology into the current state air toxic program.

Comment Procedures: All persons interested in these matters are invited to attend the public hearings. Any person desiring to comment for more than three minutes is requested to submit a written statement for inclusion in the record of proceedings at the public hearing. Comments are especially sought on when to do plant-wide modeling for air toxics and how to treat modifications. The hearing record will remain open until April 26, 1993 to receive additional written statements.

Comments should be sent to and additional information concerning the hearing or the proposals may be obtained by contacting:

Mr. Thomas C. Allen
Division of Environmental Management

P.O. Box 29535
Raleigh, North Carolina 27626-0535
(919) 733-1489

CHAPTER 2 - ENVIRONMENTAL MANAGEMENT

SUBCHAPTER 2H - PROCEDURES FOR PERMITS: APPROVALS

SECTION .0600 - AIR QUALITY PERMITS

.0610 PERMIT REQUIREMENTS FOR TOXIC AIR POLLUTANTS

(a) Definitions. For the purposes of this Rule, the following definitions apply:

- (1) "Construction, Reconstruction, or Modification" means any physical change in, or change in the method of operation of, a facility which increases the amount of emissions or ambient concentration of any pollutant listed in Paragraph (h) of this Rule or which results in the emission of any pollutant listed in Paragraph (h) of this Rule not previously emitted.
- (2) "Evaluation" means a determination of ambient air concentrations as described under 15A NCAC 2D .1106.
- (3) "Existing facility" means any facility that was permitted to construct or was in operation before July 1, 1993.
- (4) "MACT" means any maximum achievable control technology emission standard applied to a source or facility pursuant to Title III of the 1990 federal Clean Air Act Amendments.
- (5) "Net increase" means the change in representative emissions during consecutive periods corresponding to the periods contained in Paragraph (h) of this Rule. Representative emissions shall be determined from emissions occurring between January 1, 1992, and July 1, 1993.

~~(a)(b)~~ Applicability. No person shall cause or allow any toxic air pollutant named in 15A NCAC 2D .1104 to be emitted into the atmosphere from any source without having received a permit from the commission in accordance with the following:

- (1) New Facilities. Any facility that begins construction after July 1, 1993, and that:
 - (A) is required to have a permit because of applicability of Sections in Subchapter 2D of this Chapter other than .1100 of this Subchapter, except for facilities whose emissions of toxic air pollutants only result from combusting only unadulterated fossil fuels or unadulterated wood and associated storage of such fuels; or
 - (B) has a standard industrial classification (SIC) code that has previously been called under Subparagraph (b)(3) of this Rule;
shall comply with Section .1100 of this Subchapter before beginning construction or operation, shall have received a permit to emit toxic air pollutants before beginning construction, except as provided in Paragraph (g) or (h), and shall comply with such permit when beginning operation.
- ~~(1) Sources and modifications of sources which require a permit or permit modification because of the applicability of Sections in Subchapter 2D of this Chapter other than Section .1100 and which began construction after April 30, 1990, shall have received a permit or permit modification to emit toxic air pollutants before beginning construction and shall be in compliance with their permit when beginning operations.~~
- (2) Facilities with Incinerators. The owner or operator of any incinerator subject to 15A NCAC 2D .1200 which began construction or was in operation before October 1, 1991, shall apply for a permit or a permit modification to emit toxic air pollutants from the incinerator, including associated waste handling and storage, in accordance with the compliance schedules contained in 15A NCAC 2D .1209. All other sources at the facility with the incinerator shall be included, and the owner or operator of these sources The owner or operator of the incinerator shall apply for a permit or a permit modification to emit toxic air pollutants from all other these sources at that facility in accordance with Paragraph Subparagraph (b)(3) through (6) or (e) of this Rule.
- (3) SIC Calls for Existing Facilities. The owner or operator of an existing facility shall have 180 days to apply for a permit or permit modification for the emissions of toxic air pollutants after receiving written notification from the Director. Such facilities shall comply with 15A NCAC 2D .1100 as follows:

- (A) If it is not known that the source is, or will be, subject to a MACT at the time of notification, the source shall comply:
 - (i) within three years from the date that the permit is issued if the source does not emit any toxic air pollutant in common with any source at the facility subject to MACT, or
 - (ii) in accordance with Subparagraph (b)(4) of this Rule if the source emits a toxic air pollutant in common with any source at the facility subject to MACT, or
- (B) If it is known that the source is, or will be, subject to a MACT at the time of notification, the source shall comply in accordance with Subparagraph (b)(4) of this Rule.

The Director shall notify facilities subject to this Subparagraph by calling for permit applications on the basis of standard industrial classifications, that is, he shall call at one time for permits for all facilities statewide that have the same four-digit standard industrial classification code, except those facilities located in certified local air pollution control agency areas. All sources, regardless of their standard industrial classification code and including sources combusting only unadulterated fossil fuels or unadulterated wood, at the facility shall be included in the call for permit applications. All members of a source or facility category not having a standard industrial classification code shall similarly be called at one time. For categories of sources, excluding cooling towers, for which it is known that the Environmental Protection Agency (EPA) has scheduled promulgation of a MACT under Section 112(e) of the federal Clean Air Act, the Director shall notify facilities in these categories as the EPA promulgates MACT. If the EPA fails to promulgate a MACT as scheduled after it has approved the State's Title V permit program, the Director shall notify facilities 18 months after the missed promulgation date. For categories of sources for which the EPA has not scheduled promulgation of a MACT, the Director shall notify all permitted facilities by November 15, 2000.

- (4) Existing Facilities Subject to MACT. The owner or operator of an existing facility subject to one or more MACT, or that may be subject to a MACT based on studies required by Section 112 (n)(1) of the Clean Air Act, 42 U.S.C. Section 7412 (n)(1), shall submit a permit application to comply with Section .1100 of this Subchapter at the same time that he submits a permit application to comply with the MACT.
- (A) If it is not known that the facility will be subject to more than one MACT when the first MACT is applied, i.e., the facility is subject to a single MACT:
 - (i) The permit application shall include an evaluation for all toxic air pollutants covered under Rule .1104 of this Subchapter for all sources at the facility; and
 - (ii) The facility shall comply with the requirements of Section .1100 of this Subchapter by the same deadline that it is required to comply with the MACT.
- (B) If it is known that the facility is, or will be, subject to more than one MACT when a MACT is applied, i.e., the facility is subject to multiple MACT:
 - (i) When the first MACT is applied, the permit application shall include an evaluation for all toxic air pollutants covered under Rule .1104 of this Subchapter for:
 - (I) all sources at the facility not known to be subject to any MACT and that do not emit any toxic air pollutants in common with any subsequent MACT for that facility, and
 - (II) the sources at the facility to which the first MACT is applied.

These sources shall comply with the requirements of Section .1100 of this Subchapter by the compliance date for the first MACT.

- (ii) When a subsequent MACT is applied, the permit application shall include an evaluation for all toxic air pollutants covered under Rule .1104 of this Subchapter for:
 - (I) all sources at the facility that have been previously evaluated,
 - (II) the sources at the facility to which this subsequent MACT is applied, and
 - (III) all sources at the facility not known to be subject to any MACT and that do not emit any toxic air pollutants in common with a MACT for the facility subsequent to this subsequent MACT.

These sources shall comply with the requirements of Section .1100 of this Subchapter by the compliance date for the subsequent MACT.

- (5) Construction, Reconstruction, or Modification.
 - (A) The owner or operator of any facility that has not been subject to an air toxic evaluation pursuant to Subparagraph (b)(1), (b)(4)(A) or (b)(6) of this Rule or that has not otherwise been subject to a facility-wide air toxic evaluation, shall submit a permit application to comply with 15A NCAC 2D .1100 if:

- (i) Any construction, reconstruction, or modification of the facility, undertaken after July 1, 1993 that:
 - (I) results in a documented (by the owner or operator of the facility to the satisfaction of the Director) facility-wide cumulative net increase from July 1, 1993, in emissions of any toxic air pollutant above the levels contained in Paragraph (h) of the this Rule; and
 - (II) is not solely for one or more sources whose emissions of toxic air pollutants only result from combusting only unadulterated fossil fuels or unadulterated wood and associated storage of such fuels; or
- (ii) The Director finds that the construction, reconstruction, or modification of the facility will significantly increase the risk to human health posed by the facility. The Director may require the owner or operator of a facility subject to this Subpart to provide a satisfactory analysis showing what the resultant emissions and increase of risk to human health from the constructed, reconstructed, or modified facility will be.

The permit application shall include an evaluation for all toxic air pollutants covered under Rule .1104 of this Subchapter emitted by (1) sources involved in the construction, reconstruction, or modification and (2) all other sources at the facility emitting a toxic air pollutant in common with the sources involved in the construction, reconstruction, or modification (a) that have previously been evaluated under Part (4)(B) of this Paragraph or (b) that are not known to be subject to a MACT or to emit any toxic air pollutants in common with any source at that facility that will be subject to a MACT. Sources involved in the construction, reconstruction, or modification and any other source emitting a pollutant in common with the sources involved in the construction, reconstruction, or modification that have previously been evaluated under Part (4)(B) of this Paragraph or that are not known to be subject to a MACT or to emit any toxic air pollutants in common with any source at that facility that will be subject to a MACT shall comply with Section .1100 of this Subchapter before operation of the constructed, reconstructed, or modified sources begins.

- (B) Any facility that has been subject to an air toxic evaluation under Subparagraph (b)(1), (b)(4)(A), or (b)(6) of this Rule or has otherwise been subject to a facility-wide air toxic evaluation shall submit a permit application to comply with 15A NCAC 2D .1100 if:

- (i) Any construction, reconstruction, or modification of the facility undertaken after July 1, 1993 results in a net increase in emissions of any toxic air pollutant, including emissions from all sources at the facility; or
- (ii) The Director finds that the construction, reconstruction, or modification of the facility will significantly increase the risk to human health posed by the facility. The Director may require the owner or operator of a facility subject to this Part to provide a satisfactory analysis showing what the resultant emissions and increase to human health from the constructed, reconstructed, or modified facility will be.

The permit application shall include an evaluation of all changes affecting compliance since the previous air toxic evaluation for all toxic air pollutants covered under Rule .1104 of this Subchapter emitted by all sources at the facility. The facility shall comply with Section .1100 of this Subchapter before operation of the constructed, reconstructed, or modified sources begins.

- (C) Facilities that should have applied for a permit to emit toxic air pollutants between May 1, 1990, and July 1, 1993, inclusively, but failed to do so, shall be included under Part (B) of this Subparagraph. Facilities with an incinerator that was operating on the date that required the owner or operator of the incinerator to apply for an air toxic permit which occurred before July 1, 1993, if the facility does not have an air toxic permit for the entire facility, shall be included under Part (B) of this Subparagraph.

- (6) Previously Permitted Facilities.

- (A) A facility that received a permit to emit toxic air pollutants before July 1, 1993, shall continue to operate under the terms of such permit. The emissions of toxic air pollutants resulting from construction, reconstruction, or modification of the facility will be regulated pursuant to Paragraph (b)(5)(B) of this Rule.
- (B) A facility that has received a permit to emit toxic air pollutants before July 1, 1993, that is operating under a compliance schedule previously approved by the Director, and that will be subject to a MACT shall be required to comply with the terms of such compliance schedule

unless the owner or operator of the facility demonstrates to the satisfaction of the Director that compliance requires substantial capital expenditures that may be rendered unnecessary when MACT is applied. Where such a demonstration is made, the owner or operator of the facility shall submit a permit application to comply with 15A NCAC 2D .1100 in accordance with Subparagraphs (b)(3), (4), or (5) of this Rule.

- ~~(3) Paragraph (a)(1) of this Rule does not apply to sources whose emissions result from combusting only unadulterated fossil fuels or unadulterated wood if the permit application is only for this type of combustion source and if the facility has not already been permitted or applied for a permit to emit toxic air pollutants.~~
- ~~(4) The owner or operator of any source other than sources required to have a permit under Paragraph (a)(1) of this Rule shall have 180 days to apply for a permit or permit modification for the emissions of toxic air pollutants after receiving written notification from the division.~~
- ~~(5) When the director calls for permit applications for facilities pursuant to Paragraph (a)(4) of this Rule, he shall call for permit applications on the basis of standard industrial classifications, that is, he shall call at one time for permits for all facilities statewide that have the same four digit standard industrial classification code, except those facilities located in certified local air pollution control agency areas. All sources, regardless of their standard industrial classification code and including sources combusting only unadulterated fossil fuels or unadulterated wood, at the facility shall be included in the call for permit applications. All members of a source or facility category not having a standard industrial classification code shall similarly be called at one time.~~
- ~~(6) The owner or operator of a source required to obtain a permit or permit modification before the date on which the guidelines in 15A NCAC 2D .1104(b) become effective shall be required to obtain the permit or permit modification only for toxic air pollutants named in 15A NCAC 2D .1104(a). However, the owner or operator of the source will later be required in accordance with Paragraph (a)(4) of this Rule to obtain permit modifications covering toxic air pollutants named in 15A NCAC 2D .1104(b).~~
- ~~(7) Permit calls made under this Rule shall be limited to the emissions of toxic air pollutants.~~

~~(b)(c)~~ Demonstrations. The owner or operator of a source who is applying for a permit or permit modification to emit toxic air pollutants shall:

- (1) demonstrate to the satisfaction of the Director through dispersion modeling that the emissions of toxic air pollutants from the facility will not cause any acceptable ambient level listed in 15A NCAC 2D .1104 to be exceeded; or
- (2) demonstrate to the satisfaction of the commission or its delegate that the ambient concentration beyond the premises (contiguous property boundary) for the subject toxic air pollutant will not adversely affect human health even though the concentration is higher than the acceptable ambient level in 15A NCAC 2D .1104 by providing one of the following demonstrations:
 - (A) the area where the ambient concentrations are expected to exceed the acceptable ambient levels in 15A NCAC 2D .1104 are not inhabitable or occupied for the duration of the averaging time of the pollutant of concern, or
 - (B) new toxicological data that shows that the acceptable ambient level in 15A NCAC 2D .1104 for the pollutant of concern is too low and the facility's ambient impact is below the level indicated by the toxicological data.

~~(e)(d)~~ Technically Infeasible and Economic Hardship. This Paragraph shall not apply to any incinerator covered under ~~Section~~ 15A NCAC 2D .1200. The owner or operator of any source constructed before May 1, 1990, who cannot supply a demonstration described in Paragraph ~~(c)~~ ~~(b)~~ of this Rule shall:

- ~~(1) submit a compliance schedule acceptable to the Director that will reduce the subject toxic air pollutant ambient concentration within three years after receiving written notification from the Director pursuant to Paragraph (a)(4) of this Rule to a level that will not exceed any acceptable ambient level listed in 15A NCAC 2D .1104;~~
- ~~(2) (1)~~ demonstrate to the satisfaction of the commission or its delegate that complying with the guidelines in 15A NCAC 2D .1104 is technically infeasible (the technology necessary to reduce emissions to a level to prevent the acceptable ambient levels in 15A NCAC 2D .1104 from being exceeded does not exist); or
- ~~(3)~~ ~~(2)~~ demonstrate to the satisfaction of the commission or its delegate that complying with the guidelines in 15A NCAC 2D .1104 would result in serious economic hardship.

(d) If the owner or operator makes a demonstration to the satisfaction of the commission or its delegate pursuant to ~~Paragraph (c)(2) or (3) of this Rule~~ Subparagraphs (1) or (2) of this Paragraph, the Director shall require the owner or operator of the source to apply maximum feasible control. Maximum feasible control shall be in place and operating within three years from the date that the permit is issued for the maximum feasible control ~~after receiving written notification from the Director pursuant to Paragraph (a)(4) of this Rule.~~

(e) Public Notice and Opportunity for Public Hearing. If the owner or operator of a source chooses to make a demonstration pursuant to ~~Paragraph Subparagraph (b)(c)(2) or (d)(1) or (2)(c)(2) or (3) of this Rule~~, the commission or its delegate shall approve or disapprove the permit after a public notice with an opportunity for a public hearing. The public notice shall meet the requirements of Paragraph (d) of Rule .0603 of this Section. Any subsequent public hearing shall meet the requirements of Paragraph (e) of Rule .0603 of this Section except that the permit, if approved, shall not become part of the North Carolina State Implementation Plan for Air Quality.

(f) Modeling Demonstration. If the owner or operator of a facility demonstrates by modeling that any toxic air pollutant emitted from his facility contributes an incremental concentration to the ambient air concentration of that pollutant beyond his premises which is less than the acceptable ambient level values given in 15A NCAC 2D .1104, he does not have to provide any further modeling demonstration with his permit application. However, the commission may still require more stringent emission levels in accordance with its analysis under 15A NCAC 2D .1107.

(g) Exemptions. A permit to emit toxic air pollutants shall not be required for:

- (1) the noncommercial use of household cleaners, household chemicals, or household fuels in private residences;
- (2) asbestos demolition and renovation projects that comply with 15A NCAC 2D .0525 and that are being done by persons accredited by the Department of Environment, Health, and Natural Resources under the Asbestos Hazard Emergency Response Act;
- (3) emissions from gasoline dispensing facility or gasoline service station operations performed as a part of petroleum distribution to the ultimate consumer where the emissions comply with 15A NCAC 2D .0524, .0925, .0928, .0932 and .0933 and that receive gasoline from bulk gasoline plants or bulk gasoline terminals that comply with 15A NCAC 2D .0524, .0925, .0926, .0927, .0932, and .0933 via tank trucks that comply with 15A NCAC 2D .0932;
- (4) the use for agricultural operations by a farmer of fertilizers, pesticides, or other agricultural chemicals containing one or more of the compounds listed in 15A NCAC 2D .1104 if such compounds are applied in accordance with agronomic practices acceptable to the North Carolina Department of Agriculture and the Commission.
- (5) manholes and customer vents of wastewater collection systems;
- (6) emissions of ethylene oxide resulting from use as a sterilant in the production and subsequent storage of medical devices or the packaging and subsequent storage of medical devices for sale provided that the emissions from all new and existing sources located at the facility described in Paragraph (d) of 15A NCAC 2D .0538 are controlled at least to the degree described in Paragraph (d) of 15A NCAC 2D .0538 and the facility complies with Paragraphs (e) and (f) of 15A NCAC 2D .0538.
- (7) emissions from bulk gasoline plants, including emissions from the storage and handling of fuel oils, kerosenes, and jet fuels but excluding emissions from the storage and handling of other organic liquids, that comply with 15A NCAC 2D .0524, .0925, .0926, .0932, and .0933 unless the Director finds that a permit to emit toxic air pollutants is required under this Rule for a particular bulk gasoline plant;
- (8) emissions from bulk gasoline terminals, including emissions from the storage and handling of fuel oils, kerosenes, and jet fuels but excluding emissions from the storage and handling of other organic liquids, that comply with 15A NCAC 2D .0524, .0925, .0927, .0932, and .0933 if the bulk gasoline terminal existed before November 1, 1992, unless:
 - (A) the Director finds that a permit to emit toxic air pollutants is required under this Rule for a particular bulk gasoline terminal, or
 - (B) the owner or operator of the bulk gasoline terminal meets the requirements of 15A NCAC 2D .0927 (i).

(h) Emission Rates Requiring a Permit. A permit to emit toxic air pollutants shall ~~not~~ be required for any facility whose actual emissions from all sources are ~~no more than~~ greater than any one of the following:

	lb/yr	lb/day	lb/hr	lb/15 min.
(1) acetaldehyde				1.7
(2) acetic acid				0.24
(3) acrolein				0.005
(4) acrylonitrile	10			
(5) ammonia				0.17
(6) ammonium chromed		0.013		
(7) ammonium dichromate		0.013		
(8) aniline			0.25	
(9) arsenic and inorganic arsenic compounds	0.016			
(10) asbestos	1.9x10 ⁻⁶			
(11) aziridine		0.13		
(12) benzene	8.1			
(13) benzidine and salts	0.0010			
(14) benzo(a)pyrene	2.2			
(15) benzyl chloride			0.13	
(16) beryllium	0.28			
(17) beryllium chloride	0.28			
(18) beryllium fluoride	0.28			
(19) beryllium nitrate	0.28			
(20) bis-chloromethyl ether	0.025			
(21) bromine				0.013
(22) 1,3-butadiene	12			
(23) cadmium	0.37			
(24) cadmium acetate	0.37			
(25) cadmium bromide	0.37			
(26) calcium chromed	0.0056			
(27) carbon disulfide		3.9		
(28) carbon tetrachloride	460			
(29) chlorine		0.79		0.057
(30) chlorobenzene		46		
(31) chloroform	290			
(32) chloroprene		9.2	0.89	
(33) chromic acid		0.013		
(34) chromium (VI)	0.0056			
(35) cresol			0.56	
(36) p-dichlorobenzene				4.2
(37) dichlorodifluoromethane		5200		
(38) dichlorofluoromethane		10		
(39) di(2-ethylhexyl) phthalate		0.63		
(40) dimethyl sulfate		0.063		
(41) 1,4-dioxane		12		
(42) epichlorohydrin	5600			
(43) ethyl acetate			36	
(44) ethylenediamine		6.3	0.64	
(45) ethylene dibromide	27			
(46) ethylene dichloride	260			
(47) ethylene glycol monoethyl ether		2.5	0.48	

(48)	ethylene oxide	1.8		
(49)	ethyl mercaptan		0.025	
(50)	fluorides	0.34	0.064	
(51)	formaldehyde			0.010
(52)	hexachlorocyclo- pentadiene		0.013	0.0025
(53)	hexachlorodibenzo- p-dioxin	0.0051		
(54)	n-hexane	23		
(55)	hexane isomers except n-hexane			23
(56)	hydrazine	0.013		
(57)	hydrogen chloride			0.045
(58)	hydrogen cyanide	2.9	0.28	
(59)	hydrogen fluoride	0.63		0.016
(60)	hydrogen sulfide			0.13
(61)	maleic anhydride	0.25	0.025	
(62)	manganese and compounds	0.63		
(63)	manganese cyclopentadienyl tricarbonyl		0.013	
(64)	manganese tetroxide		0.13	
(65)	mercury, alkyl		0.0013	
(66)	mercury, aryl and inorganic compounds		0.013	
(67)	mercury, vapor		0.013	
(68)	methyl chloroform		250	16
(69)	methylene chloride	1600		
(70)	methyl ethyl ketone		78	5.6
(71)	methyl isobutyl ketone		52	1.9
(72)	methyl mercaptan			0.013
(73)	nickel carbonyl		0.013	
(74)	nickel metal		0.13	
(75)	nickel, soluble compounds, as nickel		0.013	
(76)	nickel subsulfide	0.14		
(77)	nitric acid			0.064
(78)	nitrobenzene		1.3	0.13
(79)	N-nitrosodimethylamine	3.4		
(80)	pentachlorophenol		0.063	0.0064
(81)	perchloroethylene	13,000		
(82)	phenol			0.24
(83)	phosgene		0.052	
(84)	phosphine			0.008
(85)	polychlorinated biphenyls	5.6		
(86)	potassium chromate		0.013	
(87)	potassium dichromate		0.013	
(88)	sodium chromate		0.013	
(89)	sodium dichromate		0.013	
(90)	strontium chromate	0.0056		
(91)	styrene		2.7	
(92)	sulfuric acid		0.25	0.025
(93)	tetrachlorodibenzo- p-dioxin	0.00020		

(94)	1,1,1,2-tetrachloro- 2,2-difluoroethane	1100	
(95)	1,1,2,2-tetrachloro- 1,2-difluoroethane	1100	
(96)	1,1,1,2-tetrachloro- ethane	430	
(97)	toluene	98	3.6
(98)	toluene-2,4-diisocyanate	0.011	0.001
(99)	trichloroethylene	4000	
(100)	trichlorofluoromethane		140
(101)	1,1,2-trichloro- 1,2,2-trifluoroethane		60
(102)	vinyl chloride	26	
(103)	vinylidene chloride	2.5	
(104)	xylene	57	4.1
(105)	zinc chromate	0.0056	

(i) Calls by the Director. Notwithstanding any other provision of this Rule or 15A NCAC 2D .1104, the Director may, upon written finding that a source or facility emitting toxic air pollutants presents an unacceptable risk to human health that will not otherwise be addressed in a timely manner, require the owner or operator of the source or facility to submit a permit application to comply with 15A NCAC 2D .1100.

Statutory Authority G.S. 143-215.3(a)(1); 143-215.108; 143B-282.

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10C - INLAND FISHING REGULATIONS

SECTION .0100 - JURISDICTION OF AGENCIES: CLASSIFICATION OF WATERS

.0107 SPECIAL REGULATIONS: JOINT WATERS

In order to effectively manage all fisheries resources in joint waters and in order to confer enforcement powers on both fisheries enforcement officers and wildlife enforcement officers with respect to certain rules; the Marine Fisheries Commission and the Wildlife Resources Commission deem it necessary to adopt special rules for joint waters. Such rules supersede any inconsistent rules of the Marine Fisheries Commission or the Wildlife Resources Commission that would otherwise be applicable in joint waters under the provisions of 15A NCAC 10C .0106:

- (1) Striped Bass
 - (a) It shall be unlawful to possess any striped bass or striped bass hybrid taken by any means which is less than 18 inches long (total length).
 - (b) It shall be unlawful to possess more than three striped bass or their hybrids taken by hook and line in any one day

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Wildlife Resources Commission intends to amend rule cited as 15A NCAC 10C .0107.

The proposed effective date of this action is July 1, 1993.

The public hearing will be conducted at 7:00 p.m. on April 5, 1993 at the First Floor Conference Room, Archdale Building, 512 North Salisbury Street, Raleigh, NC 27604-1188.

Reason for Proposed Action: To provide consistency in the regulation of striped bass by Marine Fisheries and the Wildlife Resources Commission.

Comment Procedures: Interested persons may present their views either orally or in writing at the hearing. In addition, the record of hearing will be open for receipt of written comments from March 1, 1993 to April 5, 1993. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 North Salisbury Street, Raleigh, NC 27604-1188.

from joint waters.

- (c) It shall be unlawful to engage in net fishing for striped bass or their hybrids in joint waters except as authorized by duly adopted regulations of the Marine Fisheries Commission.
- (d) It is unlawful to possess striped bass or striped bass hybrids in the joint waters of Albemarle, Currituck, Roanoke and Croatan Sounds and their tributaries, excluding the Roanoke River, except during seasons as authorized by duly adopted rules of the Marine Fisheries Commission.
- (e) ~~It is unlawful to possess striped bass or striped bass hybrids~~ In the joint waters of the Roanoke River and its tributaries, including Cashie, Middle and Eastmost Rivers, striped bass and hybrid striped bass fishing season, size limits and creel limits shall be the same as those established by ~~except during seasons as~~ authorized by duly adopted rules of the Wildlife Resources Commission for adjacent inland fishing waters.
- (2) Lake Mattamuskeet
 - (a) It shall be unlawful to set or attempt to set any gill net in Lake Mattamuskeet canals designated as joint waters.
 - (b) It shall be unlawful to use or attempt to use any trawl net or seines in Lake Mattamuskeet canals designated as joint waters.
- (3) Cape Fear River. It shall be unlawful to use or attempt to use any net or net stakes within 800 feet of the dam at Lock No. 1 on Cape Fear River.

Statutory Authority G.S. 113-132; 113-134; 113-138; 113-292.

* * * * *

Notice is hereby given in accordance with G.S. 150B-21.2 that the N. C. Wildlife Resources Commission intends to amend rules cited as 15A NCAC 10C .0108 and .0205.

The proposed effective date of this action is July 1, 1993.

Instructions on How to Demand a Public Hearing

(must be requested in writing within 15 days of notice): A request for a public hearing must be in writing and must be submitted to Charles Fullwood, Executive Director, Wildlife Resources Commission, 512 North Salisbury Street, Raleigh, NC 27604-1188.

Reason for Proposed Actions: 15A NCAC 10C .0108 - To change the reference to another administrative rule and to incorporate the same by reference. 15A NCAC 10C .0205 - To designate an Ashe County lake as delayed harvest trout water.

Comment Procedures: Interested persons may present their views in writing from March 1, 1993 to March 31, 1993. Such written comments must be delivered or mailed to the N.C. Wildlife Resources Commission, 512 North Salisbury Street, Raleigh, NC 27604-1188.

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10C - INLAND FISHING REGULATIONS

SECTION .0100 - JURISDICTION OF AGENCIES: CLASSIFICATION OF WATERS

.0108 SPECIFIC CLASSIFICATION OF WATERS

The several sounds and estuarine and tributary waters all or portions of which are specifically classified as inland, joint, or coastal fishing waters by agreement of the Marine Fisheries Commission and the Wildlife Resources Commission are listed in the regulations of the Marine Fisheries Commission under 15A NCAC 3Q .0200 ~~15A NCAC 3F .0200, effective January 1, 1977, amended effective January 1, 1978, and January 1, 1981,~~ and such list and classification is incorporated herein by reference, shall include any later amendments, and is made a part of this Section to the same extent as if the same were fully set forth herein.

Statutory Authority G.S. 113-129; 113-132; 113-134; 150B-14.

SECTION .0200 - GENERAL REGULATIONS

.0205 PUBLIC MOUNTAIN TROUT WATERS

(a) Designation of Public Mountain Trout Waters. On game lands located in western North Carolina certain waters are designated as public mountain trout waters and classified as wild trout waters or hatchery supported waters. For specific classifications see Subparagraphs (1) and (2) of Paragraph (a) of this Rule. Other streams, portions of streams, and bodies of water which are not located on game lands are designated within this Rule as public mountain trout waters and are classified as hatchery supported trout waters or wild trout waters. These waters are posted and lists thereof are filed with the clerks of superior court of the counties in which they are located:

(1) Hatchery Supported Trout Waters. The hatchery supported public mountain trout waters are designated in this Subparagraph under the counties where located. Where specific watercourses are listed indentation indicates the watercourse named is tributary to the next preceding watercourse named and not so indented. The designation applies to the entire watercourse or impoundment named, including tributaries when on game lands, except as otherwise indicated in parentheses following the name. Other clarifying information may also be included parenthetically:

(A) Alleghany County:

New River (not trout water)

Little River (Whitehead to McCann Dam)

Crab Creek

Brush Creek (except where posted against trespass)

Little Pine Creek

Big Pine Creek

Little Glade Creek

Laurel Branch

Big Glade Creek

Bledsoe Creek

Pine Swamp Creek

Waterfalls Creek (South Fork Little River)(except where posted against trespass)

South Fork New River (not trout water)

Prather Creek

Cranberry Creek

Piney Fork

Meadow Fork

Yadkin River (not trout water)

Roaring River (not trout water)

East Prong Roaring River (that portion on Stone Mountain State Park) Delayed Harvest

Waters regulations apply. See Subparagraph (5) of Paragraph (a) of this Rule.

Stone Mountain Creek

(B) Ashe County:

New River (not trout waters)

North Fork New River (Watauga Co. line to Sharp Dam)

Helton Creek (Virginia State line to New River)

Big Horse Creek (SR 1361 bridge to Tuckerdale)

Buffalo Creek (headwaters to junction of NC 194-88 and SR 1131)

Big Laurel Creek

Three Top Creek (portion not on game lands)

Hoskins Fork (Watauga County line to North Fork New River)

South Fork New River (not trout waters)

Cranberry Creek (Alleghany County line to South Fork New River)

Nathans Creek

Peak Creek (headwaters to Trout Lake, except Blue Ridge Parkway waters)

Trout Lake (Delayed harvest regulations apply)

Roan Creek

North Beaver Creek

South Beaver Creek (headwaters to Ashe Lake)

Pine Swamp Creek (all forks)

Old Fields Creek

Call Creek (West Prong Old Fields Creek)

Mill Creek (except where posted against trespass)

(C) Avery County:

Nolichucky River (not trout waters)

North Toe River (headwaters to Mitchell County line, except where posted against trespass)

Plumtree Creek

Roaring Creek

Squirrel Creek

- Elk River (SR 1306 crossing to Tennessee State line)
- Elk River (Lees-McRae College boundary line to NC 194 bridge at Heaton, except where posted against trespass)
- Catawba River (not trout water)
- Johns River (not trout water)
- Wilson Creek [not Hatchery Supported trout water, see Subparagraph (2) of Paragraph (a) of this Rule]
- Lost Cove Creek [not Hatchery Supported trout water, see Subparagraph (4) of Paragraph (a) of this Rule]
- Gragg Prong
- Webb Prong
- Buck Timber Creek [not Hatchery Supported trout water, see Subparagraph (2) of Paragraph (a) of this Rule]
- Cary Flat Branch [not Hatchery Supported trout water, see Subparagraph (2) of Paragraph (a) of this Rule]
- Boyde Coffey Lake
- Archie Coffey Lake
- Linville River (Sloop Dam to Blue Ridge Parkway boundary line)
- Milltimber Creek
- Linville River [Land Harbor line (below dam) to Ben Aldridge line, except Bob Miller property]
- (D) Buncombe County:
 - French Broad River (not trout water)
 - Big Ivy Creek (Ivy River) (Dillingham Creek to US 19-23 bridge)
 - Dillingham Creek (Corner Rock Creek to Big Ivy Creek)
 - Stony Creek
 - Mineral Creek
 - Corner Rock Creek
 - Reems Creek (Woodfin Watershed dam to US 19-23 bridge, except where posted against trespass)
 - Swannanoa River (SR 2702 bridge near Ridgecrest to Sayles Bleachery in Asheville, except where posted against trespass)
 - Bent Creek
 - Lake Powhatan
- Cane Creek (headwaters to SR 3138 bridge)
- (E) Burke County:
 - Catawba River (not trout water)
 - South Fork Catawba River (not trout water)
 - Henry Fork (lower Morganton watershed line downstream to SR 1919 at Ivy Creek)
 - Jacob Fork (Shinny Creek to lower South Mountain State Park boundary) Delayed Harvest Regulations apply. See Subparagraph (a)(5) of this Rule.
 - Johns River (not trout water)
 - Parks Creek (not trout water)
 - Carroll Creek (game lands above SR 1405)
 - Linville River (first bridge on SR 1223 below Lake James powerhouse to Muddy Creek)
- (F) Caldwell County:
 - Catawba River (not trout water)
 - Johns River (not trout water)
 - Wilson Creek (Phillips Branch to Browns Mountain Beach dam, except where posted against trespass)
 - Estes Mill Creek (not trout water)
 - Thorpe Creek (falls to NC 90 bridge)
 - Mulberry Creek (not trout water)
 - Boone Fork (not Hatchery Supported trout water)
 - Boone Fork Pond
- (G) Cherokee County:
 - Hiwassee River (not trout water)
 - Shuler Creek (headwaters to Tennessee line, except where posted against trespass)
 - North Shoal Creek (Crane Creek) (headwaters to SR 1325)
 - Persimmon Creek
 - Davis Creek
 - Bald Creek
 - Beaver Dam Creek (headwaters to SR 1326 bridge)
 - Valley River
 - Hyatt Creek
 - Webb Creek
 - Junaluska Creek (bridge at U.S. Forest Service road 440, Section

- No. 4, to Valley River)
- (H) Clay County:
- Hiwassee River (not trout water)
 - Fires Creek (bear sanctuary line to SR 1300)
 - Tusquitee Creek (headwaters to lower SR 1300 bridge)
 - Tuni Creek
 - Chatuge Lake (not trout water)
 - Shooting Creek (headwaters to US 64 bridge at SR 1338)
 - Hothouse Branch
 - Vineyard Creek

- (I) Graham County:
- Little Tennessee River (not trout water)
 - Calderwood Reservoir (Cheoah Dam to Tennessee State line)
 - Cheoah River (not trout water)
 - Yellow Creek
 - West Buffalo Creek
 - Santeelah Reservoir (not trout water)
 - Santeelah Creek (Johns Branch to mouth)
 - Huffman Creek (Little Buffalo Creek)
 - Squalla Creek
 - South Fork Squalla Creek
 - Big Snowbird Creek (old railroad junction to mouth)
 - Mountain Creek (game lands boundary to SR 1138 bridge)
 - Long Creek (portion not on game lands)
 - Tulula Creek (headwaters to lower bridge on SR 1211)
 - Franks Creek
 - Cheoah Reservoir
 - Fontana Reservoir (not trout water)
 - Stecoah Creek
 - Sawyer Creek
 - Panther Creek

- (J) Haywood County:
- Pigeon River (not trout water)
 - Hurricane Creek
 - Cold Springs Creek
 - Jonathans Creek - lower (concrete bridge in Dellwood to Pigeon River)
 - Jonathans Creek - upper [SR 1307 bridge (west) to SR 1302 bridge]
 - Hemphill Creek
 - West Fork Pigion River (headwaters to Champion International property line)

- (K) Henderson County:
- Broad River (not trout water)
 - Rocky Broad River (one-half mile north of Bat Cave to Rutherford County line)
 - Green River - upper (mouth of Bob Creek to mouth of Rock Creek)
 - Green River - lower (Lake Summit Dam to Polk County line)
 - Camp Creek (SR 1919 to Polk County line)
 - Big Hungry River
 - Little Hungry River
 - North Fork Mills River

- (L) Jackson County:
- Tuckasegee River (confluence with West Fork Tuckasegee River to bridge at Wilmot)
 - Scott Creek (entire stream, except where posted against trespass)
 - Buff Creek (SR 1457 bridge below Bill Johnson's place to Scott Creek)
 - North Fork Scott Creek
 - Savannah Creek (Headwaters to Bradley's Packing House on NC 116)
 - Greens Creek (Greens Creek Baptist Church on SR 1730 to Savannah Creek)
 - Cullowhee Creek (Tilley Creek to Tuckasegee River, except portion posted for Western Carolina University outdoor classroom)
 - Bear Creek Lake
 - Wolf Creek [not Hatchery Supported trout water, see Subparagraph (2) of Paragraph (a) of this Rule]
 - Wolf Creek Lake
 - Balsam Lake
 - Tanasee Creek [not Hatchery Supported trout water, see Subparagraph (2) of Paragraph (a) of this Rule]
 - Tanasee Creek Lake
 - West Fork Tuckasegee River (Shoal Creek to existing water level of Little Glenville Lake)
 - Shoal Creek (Glenville Reservoir pipeline to mouth)

- (M) Macon County:
- Little Tennessee River (not trout water)
 - Nantahala River (Nantahala Dam to Swain County line) Delayed Harvest Regulations apply to

- the portion from Whiteoak Creek to the Nantahala Power and Light powerhouse discharge canal. See Subparagraph (a)(5) of this Rule.
- Queens Creek Lake
- Roaring Fork Creek (game land boundary to mouth)
- Burningtown Creek
- Cullasaja River (Sequoah Dam to US 64 bridge near junction of SR 1672)
- Ellijay Creek (except where posted against trespass)
- Skitty Creek (not trout water)
- Cliffside Lake
- Cartoogechaye Creek (US 64 bridge to Little Tennessee River)
- Tessentee Creek (Nichols Branch to Little Tennessee River, except where posted against trespassing)
- Savannah River (not trout water)
- Big Creek (base of falls to Georgia State line)
- (N) Madison County:
- French Broad River (not trout water)
- Shut-In Creek
- Spring Creek (junction of NC 209 and NC 63 to lower US Forest Service boundary line)
- Meadow Fork Creek
- Roaring Fork
- Little Creek
- Max Patch Pond
- Mill Ridge Pond
- Big Laurel Creek (Mars Hill Watershed boundary to Rice's Mill Dam)
- Shelton Laurel Creek (headwaters to NC 208 bridge)
- Big Creek (headwaters to lower game land boundary)
- Mill Creek
- Spillcorn Creek
- Puncheon Fork (Hampton Creek to Big Laurel Creek)
- (O) McDowell County:
- Catawba River (not trout water)
- Buck Creek (not trout water)
- Little Buck Creek (game land portion)
- Curtis Creek (fish barrier to US 70 bridge)
- Newberry Creek (game land portion)
- North Fork Catawba River (headwaters to North Cove School, SR 1569)
- Armstrong Creek (Cato Holler line downstream to upper Greenlee line)
- Mill Creek (upper railroad bridge to Old Fort Dam, except where posted against trespass)
- (P) Mitchell County:
- Nolichucky River (not trout water)
- Big Rock Creek (headwaters to fishing club property above A.D. Harrel farm)
- Little Rock Creek (Green Creek Bridge to Big Rock Creek, except where posted against trespass)
- Cane Creek (SR 1219 to Nolichucky River)
- Grassy Creek (East Fork Grassy Creek to mouth)
- East Fork Grassy Creek
- North Toe River (Avery County line to SR 1121, Altapass Road)
- (Q) Polk County:
- Broad River (not trout water)
- North Pacolet River (Pacolet Falls to NC 108 bridge)
- Fork Creek (Fork Creek Church on SR 1128 to North Pacolet River)
- Big Fall Creek (portion above and below water supply reservoir)
- Green River (Henderson County line to mouth of Brights Creek)
- Little Cove Creek
- Cove Creek
- Camp Creek [Henderson County line (top of falls) to Green River]
- Fulloms Creek (SR 1154 to Green River)
- (R) Rutherford County:
- Broad River (not trout water)
- Rocky Broad River (Henderson County line to head of rapids at Goose Pond Hole, except where posted against trespass)
- (S) Stokes County:
- Dan River (lower Flippin property line below SR 1416 to 200 yards downstream from end of SR 1421)
- (T) Surry County:
- Yadkin River (not trout water)
- Ararat River (SR 1727 downstream

to SR 1759) Delayed Harvest regulations apply. See

Subparagraph (5) of Paragraph (a) of this Rule.

Stewarts Creek (not trout water)

Pauls Creek (Virginia State line to SR 1625)

Fisher River (Cooper Creek) (Virginia State line to NC 89 bridge)

Little Fisher River (Virginia State line to NC 89 bridge)

Merritt Creek

(U) Swain County:

Little Tennessee River (not trout water)

Calderwood Reservoir (Cheoah Dam to Tennessee State line)

Cheoah Reservoir

Tuckasegee River (not trout water)

Deep Creek (Great Smoky Mountains National Park boundary line to Tuckasegee River)

Oconaluftee River (not trout water)

Connelly Creek

Alarka Creek

Nantahala River (Macon County line to existing Fontana Lake water level)

(V) Transylvania County:

French Broad River (junction of west and north forks to US 276 bridge)

Davidson River (Avery Creek to Ecusta intake)

East Fork French Broad River (Glady Branch to French Broad River)

Middle Fork French Broad River

West Fork French Broad River (SR 1312 and SR 1309 intersection to junction of west and north forks)

Savannah River (not trout water)

Horsepasture River (Jackson County line to existing Lake Jocassee water level)

Thompson River (SR 1152 to South Carolina state line, except where posted against trespass)

(W) Watauga County:

New River (not trout waters)

North Fork New River (headwaters to Ashe County line)

South Fork New River (not trout water)

Meat Camp Creek

Norris Fork Creek

Howards Creek (downstream from lower falls)

Middle Fork New River (Lake Chetola Dam to South Fork New River)

Yadkin River (not trout water)

Stony Fork (headwaters to Wilkes County line)

Elk Creek (headwaters to gravel pit on SR 1508, except where posted against trespass)

Watauga River (SR 1559 to SR 1114 bridge)

Beech Creek

Buckeye Creek Reservoir

Coffee Lake

Laurel Creek

Cove Creek (SR 1233 bridge at Zionville to SR 1233 bridge at Amantha)

Dutch Creek (second bridge on SR 1134 to mouth)

Crab Orchard Creek

Boone Fork (headwaters to SR 1562)

(X) Wilkes County:

Yadkin River (not trout water)

Roaring River (not trout water)

East Prong Roaring River (Bullhead Creek to Brewer's Mill on SR 1943) (Delayed harvest regulations apply to portion on Stone Mountain State Park) See Subparagraph (5) of Paragraph (a) of this Rule.

Stone Mountain Creek (Alleghany County line to Bullhead Creek)

Middle Prong Roaring River (headwaters to second bridge on SR 1736)

Harris Creek (end of SR 1716 to mouth)

Pell Branch Pond

Boundary Line Pond

West Prong Roaring River (not trout waters)

Pike Creek

Pike Creek Pond

Reddies River (not trout water)

Middle Fork Reddies River (Clear Prong) (headwaters to bridge on SR 1580)

South Fork Reddies River (headwaters to NC 16 bridge)

North Fork Reddies River

- (Vannoy Creek) (headwaters to Union School bridge on SR 1559)
North Prong Reddies River (Darnell Creek) (downstream ford on SR 1569 to confluence with North Fork)
Lewis Fork Creek (not trout water)
South Prong Lewis Fork (headwaters to Lewis Fork Baptist Church)
Fall Creek (except portions posted against trespass)
Stony Fork Creek (headwaters to Mt. Zion bridge near intersection of SR 1155 and SR 1167)
- (Y) Yancey County:
Nolichucky River (not trout water)
Cane River (Cattail Creek to Bowlens Creek)
Bald Mountain Creek (except portions posted against trespass)
Indian Creek (not trout water)
Price Creek (junction of SR 1120 and SR 1121 to Indian Creek)
South Toe River (Clear Creek to lower boundary line of Yancey County recreation park except where posted against trespass)
- (2) Wild Trout Waters. All designated public mountain trout waters located on game lands are classified as wild trout waters unless classified otherwise. The trout waters listed in this Subparagraph are also classified as wild trout waters. On game lands all tributaries to wild trout waters are also classified as wild trout waters.
- (A) Alleghany County:
Ramey Creek (entire stream)
- (B) Ashe County:
Big Horse Creek (Virginia State Line to SR 1361 bridge) Catch and Release/Artificial Lures Only
Regulations apply. See Subparagraph (a)(3) of this Rule.
- (C) Avery County:
Birchfield Creek (entire stream)
Cow Camp Creek (entire stream)
Cranberry Creek (entire stream)
Horse Creek (entire stream)
Jones Creek (entire stream)
Kentucky Creek (entire stream)
North Harper Creek (entire stream)
- Rockhouse Creek (entire stream)
South Harper Creek (entire stream)
Wilson Creek (Catch and Release/Artificial Lures Only Regulations apply. See Subparagraph (a)(3) of this Rule.)
- (D) Buncombe County:
Carter Creek (game land portion) (Catch and Release/Artificial Lures only regulations apply. See Subparagraph (3) of Paragraph (a) of this Rule.
- (E) Burke County:
All waters located on South Mountain State Park, except the main stream of Jacob Fork between the mouth of Shinny Creek and the lower park boundary where delayed harvest regulations apply. See Subparagraph (5) of Paragraph (a) of this Rule.
- (F) Caldwell County:
Buffalo Creek (headwaters to lower Dahl property line)
Joe Fork (Watauga County line to falls)
Rockhouse Creek (entire stream)
- (G) Jackson County:
Gage Creek (entire stream)
Tanasee Creek (entire stream)
Whitewater River (downstream from Silver Run Creek to South Carolina State line)
Wolf Creek (entire stream, except Balsam Lake and Wolf Creek Lake)
- (H) Mitchell County:
Green Creek (headwaters to Green Creek Bridge, except where posted against trespass)
Little Rock Creek (headwaters to Green Creek Bridge, except where posted against trespass)
Wiles Creek (game land boundary to mouth)
- (I) Transylvania County:
South Fork Mills River (entire stream)
Whitewater River (downstream from Silver Run Creek to South Carolina State line)
- (J) Watauga County:
Watauga River (Avery County line to SR 1559)
Boone Fork (Blue Ridge Parkway boundary line to Watauga River) [Catch and Release Fly

Fishing Only regulations apply. See Subparagraph (4) of Paragraph (a) of this Rule.]

Howards Creek (headwaters to lower falls)

(K) Wilkes County:

Big Sandy Creek (portion on Stone Mountain State Park)

Garden Creek (portion on Stone Mountain State Park)

Harris Creek and tributaries [portions on Stone Mountain State Park] [Catch and Release Artificial

Lures Only regulations apply. See Subparagraph (4) of Paragraph (a) of this Rule.]

Widow Creek (portion on Stone Mountain State Park)

(L) Yancey County:

Lickskillet Creek (entire stream)

Middle Creek (game land boundary to mouth)

Rock Creek (game land boundary to mouth)

South Toe River (game land boundary downstream to Clear Creek)

- (3) Catch and Release/Artificial Lures Only. Those portions of designated wild trout waters as listed in this Subparagraph, including tributaries except as noted, are further classified as Catch and Release/Artificial Lures Only waters. Only artificial lures having one single hook may be used. No fish may be harvested or be in possession while fishing these streams:

Harris Creek and tributaries (portions on Stone Mountain State Park, Wilkes County)

Big Horse Creek, excluding tributaries (Virginia state line to SR 1361 bridge, Ashe County)

Three Top Creek (portion located on Bluff Mountain Game Lands, Ashe County)

Wilson Creek (game lands portion, including tributaries, Avery County)

Upper Creek, Yancey County

Lower Creek, Yancey County

Tuckasegee River including all tributaries above the Clarke property, Jackson County

Flat Creek, Jackson County

Carter Creek (game lands portion), Buncombe County

- (4) Catch and Release/Artificial Flies Only. Those portions of designated wild trout waters as listed in this Subparagraph, including tributaries except as noted, are further classified as Catch and Release/Fly Fishing Only waters. Only artificial flies having one single hook may be used. No fish may be harvested or be in possession while fishing these streams:

Boone Fork (portion between Blue Ridge Parkway boundary and the Watauga River, Watauga

County)

South Toe River (portion from the concrete bridge above Black Mountain Campground downstream

to the game land boundary, excluding Camp Creek and Neals Creek, Yancey County)

Lost Cove Creek (game land portion, excluding Gragg Prong and Rockhouse Creek, Avery

County)

Davidson River (headwaters to Avery Creek excluding Avery Creek, Looking Glass Creek, and

Grogan Creek, Transylvania County)

- (5) Delayed Harvest. Those portions of designated Hatchery Supported Trout Waters as listed in this Subparagraph, excluding tributaries except as noted, are further classified as Delayed Harvest Waters. Between 1 March and the Friday before the first Saturday in June, inclusive, only artificial lures with one single hook may be used. No fish may be harvested or be in possession while fishing these streams during this time. On the first Saturday in June these streams revert to Hatchery Supported Waters regulations:

Ararat River (SR 1727 downstream to SR 1759, Surry County)

East Prong Roaring River (from Bullhead Creek downstream to the lower Stone Mountain State

Park boundary, Wilkes County)

Trout Lake (Ashe County)

Jacob Fork (Shinny Creek to lower South Mountain State Park boundary, Burke County)

Nantahala River (portion from Whiteoak Creek to the Nantahala Power and Light powerhouse

discharge canal, Swain County)

(b) Fishing in Trout Waters

- (1) Hatchery Supported Trout Waters. It is unlawful to take fish of any kind by any manner whatsoever from designated public mountain trout waters during the closed seasons for trout fishing. The seasons, size limits, creel limits and possession limits apply in all waters, whether designated or not, as public mountain trout waters. Except in power reservoirs and city water supply reservoirs so designated, it is unlawful to fish in designated public mountain trout waters with more than one line. Night fishing is not allowed in most hatchery supported trout waters on game lands [see 15A NCAC 10D .0004(b)(1)].
- (2) Wild Trout Waters. Except as otherwise provided in Subparagraphs (3) and (4) of Paragraph (a) of this Rule, the following rules apply to fishing in wild trout waters.
 - (A) Open Season. There is a year round open season for the licensed taking of trout.
 - (B) Creel Limit. The daily creel limit is four trout.
 - (C) Size Limit. The minimum size limit is seven inches.
 - (D) Manner of Taking. Only artificial lures having only one single hook may be used. No person shall possess live or preserved bait while fishing wild trout waters.
 - (E) Night Fishing. Fishing on wild trout waters is not allowed between one-half hour after sunset and one-half hour before sunrise.

Statutory Authority G.S. 113-134; 113-272; 113-292.

**TITLE 16 - DEPARTMENT OF
PUBLIC EDUCATION**

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Board of Education intends to amend rule cited as 16 NCAC 6E .0202.

The proposed effective date of this action is July 1, 1993.

The public hearing will be conducted at 9:30 a.m. on March 18, 1993 at the State Board Room, 7th Floor Education Bldg., 301 North Wilmington Street, Raleigh, NC 27601-2825.

Reason for Proposed Action: The North Carolina Chiropractic Association has petitioned that the rule be amended to allow chiropractors to conduct physical examinations of student athletes.

Comment Procedures: Any interested person may submit written comments through April 1, 1993, or orally at the hearing.

**CHAPTER 6 - ELEMENTARY AND
SECONDARY EDUCATION**

SUBCHAPTER 6E - STUDENTS

**SECTION .0200 - SCHOOL ATHLETICS
AND SPORTS MEDICINE**

.0202 INTERSCHOLASTIC ATHLETICS

(a) Only students in grades 7-12 may participate in interscholastic athletic competition. In order to qualify for public school participation, a student must meet the following requirements:

- (1) The student must meet the residence criteria of G.S. 115C-366(a). The student may participate only at the school to which the student is assigned by the LEA.
- (2) The principal must have evidence of the legal birth date of the student. The age limits for students as of October 16 of each year are:
 - (A) no older than age 18 for high school;
 - (B) no older than age 16 for ninth grade or junior high; and
- (C) no older than age 15 for seventh or eighth grade.
- (3) In grades 9-12, the student must pass at least five courses each semester and meet promotion standards established by the LEA. In grades 7 and 8, the student must meet state and local promotion standards and maintain passing grades each semester. Regardless of the school organization pattern, a student who is promoted from the eighth grade to the ninth grade automatically meets the courses passed requirement for the first semester of the ninth grade.

- (4) The student must receive a ~~medical~~ physical examination by a licensed medical doctor or licensed doctor of chiropractic each year (365 days).
- (5) The student may not participate after any of the following:
 - (A) graduation;
 - (B) becoming eligible to graduate;
 - (C) signing a professional athletic contract;
 - (D) receiving remuneration as a participant in an athletic contest; or
 - (E) participating on an all-star team or in an all-star game that is not sanctioned by the association of which the student's school is a member. The student is ineligible only for the specific sport involved.
- (6) A high school student may participate only during the eight consecutive semesters beginning with the student's first entry into grade nine.

(b) The SBE recognizes that the North Carolina High School Athletic Association (NCHSAA) has been organized and operates to enforce the SBE interscholastic athletic rules. The SBE supports the exercise of this function by the NCHSAA within the framework of SBE rules.

(c) The NCHSAA may waive any eligibility requirement contained in this Rule, except the age requirement, if it finds that the rule fails to accomplish its purpose or it works an undue hardship when applied to a particular student.

(d) Each principal of a school which participates in interscholastic athletics must certify a list of eligible students for each sport.

(e) The NCHSAA may adopt and impose penalties appropriate for the violation of this Rule at the high school level. The LEA which has jurisdiction over the school may impose additional penalties. LEAs or conferences may adopt and impose penalties at the middle and junior school levels.

(f) The NCHSAA must receive approval from the SBE or its designee for any new, additional or revised rule which it proposes for the governance of athletics.

Statutory Authority G.S. 115C-47(4).

TITLE 21 - OCCUPATIONAL LICENSING BOARD

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Examiners of Electrical

Contractors intends to amend rule cited as 21 NCAC 18B .0701.

The proposed effective date of this action is June 1, 1993.

The public hearing will be conducted at 12:30 p.m. on April 7, 1993 at the North Raleigh Hilton, 3415 Old Wake Forest Road, Raleigh, NC 27609.

Reason for Proposed Action: To remove the impediment to license renewal when a reciprocal agreement is terminated.

Comment Procedures: Interested persons may present statements, orally, and in writing, at the public hearing or in writing prior to the hearing by mail to: Board of Examiners of Electrical Contractors, P. O. Box 18727, Raleigh, NC 27619, Attn: Robert L. Brooks, Jr.

CHAPTER 18 - BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS

SUBCHAPTER 18B - BOARD'S RULES FOR THE IMPLEMENTATION OF THE ELECTRICAL CONTRACTING LICENSING ACT

SECTION .0700 - LICENSING RECIPROCITY

.0701 GENERAL REQUIREMENTS

(a) The Board may enter into formal reciprocal agreements with contracting licensing boards of other states whereby nonresident electrical contractors licensed by the other state boards may obtain a North Carolina electrical contracting license without written examinations provided:

- (1) The applicant furnishes to the Board a written statement from his state licensing board certifying that he holds a current electrical contracting license issued by that board;
- (2) The proposed qualified individual for the applicant is the same individual who is duly qualified for the license currently issued to the applicant by his state licensing board;
- (3) The applicant files an application on a form provided by the Board requesting a license under the formal licensing

reciprocity agreement currently in effect between the Board and the applicant's state licensing board;

- (4) Except for the written examination requirement, the applicant furnished to the Board information satisfactorily verifying to the Board that he meets all of the requirements in Sections .0200, .0300 and .0400 of this Subchapter applicable to the specific license classification requested; and
- (5) The applicant furnishes to the Board his check or money order for the annual license fee as required in Rule .0404 of this Subchapter for the specific license classification requested.

(b) The expiration date for each license issued under a formal reciprocal agreement shall be as prescribed in G.S. 87-44.

(c) The renewal application due date and late filing penalty for a license issued under a formal reciprocal agreement shall be as prescribed in Rule .0405 of this Subchapter.

~~(d) Each license issued under a specific formal reciprocal agreement shall not be renewed if the formal reciprocal agreement becomes invalid for any reason.~~

(d) ~~(e)~~ Exact copies of all formal reciprocal agreements entered into by the Board shall be filed with the North Carolina Secretary of State and the North Carolina Attorney General.

Statutory Authority G.S. 87-42; 87-50.

The Rules Review Commission (RRC) objected to the following rules in accordance with G.S. 143B-30.2(c). State agencies are required to respond to RRC as provided in G.S. 143B-30.2(d).

COMMERCE

Banking Commission

4 NCAC 3F .0402 - Required and Permissible Investments *RRC Objection 01/21/93*

Departmental Rules

<i>4 NCAC 1K .0103 - Eligible Applicants</i>	<i>RRC Objection 11/19/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 12/17/92</i>
<i>4 NCAC 1K .0204 - Discretionary Public Hearing by the Department</i>	<i>RRC Objection 11/19/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 12/17/92</i>
<i>4 NCAC 1K .0205 - Formal Application Procedures: Approval</i>	<i>RRC Objection 11/19/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 12/17/92</i>
<i>4 NCAC 1K .0206 - Formal Application Procedures: Denial</i>	<i>RRC Objection 11/19/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 12/17/92</i>
<i>4 NCAC 1K .0207 - Reimbursement of Extraordinary Expense</i>	<i>RRC Objection 11/19/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 12/17/92</i>
<i>4 NCAC 1K .0302 - Criteria for Making Necessary Findings</i>	<i>RRC Objection 11/19/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 12/17/92</i>

ENVIRONMENT, HEALTH, AND NATURAL RESOURCES

Coastal Management

<i>15A NCAC 7H .0308 - Specific Use Standards for Ocean Hazard Areas</i>	<i>RRC Objection 11/19/92</i>
<i>Rule Returned to Agency</i>	<i>12/17/92</i>
	<i>RRC Objection 01/21/93</i>

Environmental Management

<i>15A NCAC 2H .0805 - Certification and Renewal of Certification</i>	<i>RRC Objection 10/15/92</i>
<i>Agency Revised Rule</i>	<i>RRC Objection 10/15/92</i>
<i>Rule Returned to Agency</i>	<i>11/19/92</i>
<i>Agency Filed with OAH</i>	<i>Eff. 12/21/92</i>

Governor's Waste Management Board

<i>15A NCAC 14C .0005 - Conditions for Grants</i>	<i>RRC Objection 12/17/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 12/17/92</i>

Solid Waste Management

<i>15A NCAC 13B .0103 - General Conditions</i>	<i>RRC Objection 12/17/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed 12/17/92</i>

Wildlife Resources and Water Safety

<i>15A NCAC 10I .0001 - Definitions</i>	<i>RRC Objection 10/15/92</i>
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Agency Responded
Agency Responded

No Action 11/19/92
No Action 12/17/92

HUMAN RESOURCES

Medical Assistance

10 NCAC 26D .0012 - Time Limitation
Agency Withdrew Rule
10 NCAC 26N .0201 - Offer to Counsel
Agency Withdrew Rule

RRC Objection 12/17/92
 12/17/92
RRC Objection 12/17/92
 12/17/92

Mental Health: General

10 NCAC 14K .0103 - Definitions
Agency Revised Rule

RRC Objection 12/17/92
Obj. Removed 12/17/92

INDEPENDENT AGENCIES

N.C. Housing Finance Agency

24 NCAC 1M .0202 - Eligibility
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0204 - Selection Procedures
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0205 - Administration
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0206 - Program Fees
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0301 - Goal and Objectives
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0302 - Eligibility Requirements
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0303 - Threshold Review Criteria
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0306 - Funding Commitment
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0401 - Goals and Objectives
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0402 - Eligibility Requirements
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0403 - Threshold Review Criteria
 No Response from Agency
 No Response from Agency
24 NCAC 1M .0404 - Ranking Criteria

RRC Objection 10/15/92
 No Action 11/19/92
 No Action 12/17/92
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<i>No Response from Agency</i>	<i>No Action</i>	<i>11/19/92</i>
<i>No Response from Agency</i>	<i>No Action</i>	<i>12/17/92</i>
<i>24 NCAC 1M .0405 - Agency Board Approval</i>	<i>RRC Objection</i>	<i>10/15/92</i>
<i>No Response from Agency</i>	<i>No Action</i>	<i>11/19/92</i>
<i>No Response from Agency</i>	<i>No Action</i>	<i>12/17/92</i>

INSURANCE**Agent Services Division**

<i>11 NCAC 6A .0802 - Licensee Requirements</i>	<i>RRC Objection</i>	<i>12/17/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>12/17/92</i>

Departmental Rules

<i>11 NCAC 1 .0432 - Manufactured Housing Board Hearings</i>	<i>RRC Objection</i>	<i>12/17/92</i>
<i>Agency Withdrew Rule</i>		<i>12/17/92</i>

Financial Evaluation Division

<i>11 NCAC 11A .0602 - Licensure</i>	<i>RRC Objection</i>	<i>11/19/92</i>
<i>Agency Revised Rule</i>	<i>RRC Objection</i>	<i>11/19/92</i>
<i>Rule Returned to Agency</i>		<i>12/17/92</i>

Multiple Employer Welfare Arrangements

<i>11 NCAC 18 .0019 - Description of Forms</i>	<i>RRC Objection</i>	<i>06/18/92</i>
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Seniors' Health Insurance Information Program

<i>11 NCAC 17 .0005 - SHIIP Inquiries to Insurers and Agents</i>	<i>RRC Objection</i>	<i>06/18/92</i>
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LICENSING BOARDS AND COMMISSIONS**Cosmetic Art Examiners**

<i>21 NCAC 14L .0301 - Applicants Licensed as Teachers in Other States</i>	<i>RRC Objection</i>	<i>11/19/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>12/17/92</i>
<i>21 NCAC 14L .0302 - Requirements for Obtaining a Teacher's License</i>	<i>RRC Objection</i>	<i>11/19/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>12/17/92</i>

General Contractors

<i>21 NCAC 12 .0901 - Definitions</i>	<i>RRC Objection</i>	<i>12/17/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>12/17/92</i>
<i>21 NCAC 12 .0908 - Order Directing Payment from Fund</i>	<i>RRC Objection</i>	<i>12/17/92</i>
<i>Agency Revised Rule</i>	<i>Obj. Removed</i>	<i>12/17/92</i>
<i>21 NCAC 12 .0910 - Limitations; Pro Rata Distribution</i>	<i>RRC Objection</i>	<i>12/17/92</i>

REVENUE**Individual Income, Inheritance and Gift Tax Division**

<i>17 NCAC 3B .0401 - Penalties</i>	<i>RRC Objection</i>	<i>08/20/92</i>
<i>17 NCAC 3B .0402 - Interest</i>	<i>RRC Objection</i>	<i>08/20/92</i>

Individual Income Tax Division*17 NCAC 6B .0107 - Extensions**RRC Objection 08/20/92**17 NCAC 6B .0115 - Additions to Federal Taxable Income**RRC Objection 08/20/92**17 NCAC 6B .0116 - Deductions from Federal Taxable Income**RRC Objection 08/20/92**17 NCAC 6B .0117 - Transitional Adjustments**RRC Objection 08/20/92**17 NCAC 6B .3406 - Refunds**RRC Objection 08/20/92*

This Section of the Register lists the recent decisions issued by the North Carolina Supreme Court, Court of Appeals, Superior Court (when available), and the Office of Administrative Hearings which invalidate a rule in the North Carolina Administrative Code.

I NCAC 5A .0010 - ADMINISTRATIVE PROCEDURES

Thomas R. West, Administrative Law Judge with the Office of Administrative Hearings, declared two portions of Rule I NCAC 5A .0010 void as applied in *Stauffer Information Systems, Petitioner v. The North Carolina Department of Community Colleges and The North Carolina Department of Administration, Respondent and The University of Southern California, Intervenor-Respondent* (92 DOA 0666).

15A NCAC 30 .0201(a)(1)(A) - STDS FOR SHELLFISH BOTTOM & WATER COLUMN LEASES

Julian Mann III, Chief Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 30 .0201(a)(1)(A) void as applied in *William R. Willis, Petitioner v. North Carolina Division of Marine Fisheries, Respondent* (92 EHR 0820).

15A NCAC 19A .0202(d)(10) - CONTROL MEASURES - HIV

Brenda B. Becton, Administrative Law Judge with the Office of Administrative Hearings, declared Rule 15A NCAC 19A .0202(d)(10) void as applied in *ACT-UP TRIANGLE (AIDS Coalition to Unleash Power Triangle), Steven Harris, and John Doe, Petitioners v. Commission for Health Services of the State of North Carolina, Ron Levine, as Assistant Secretary of Health and State Health Director for the Department of Environment, Health, and Natural Resources of the State of North Carolina, William Cobey, as Secretary of the Department of Environment, Health, and Natural Resources of the State of North Carolina, Dr. Rebecca Meriwether, as Chief, Communicable Disease Control Section of the North Carolina Department of Environment, Health, and Natural Resources, Wayne Bobbitt Jr., as Chief of the HIV/STD Control Branch of the North Carolina Department of Environment, Health, and Natural Resources, Respondents* (91 EHR 0818).

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698.

KEY TO CASE CODES

ABC	Alcoholic Beverage Control Commission	DST	Department of State Treasurer
BDA	Board of Dental Examiners	EDC	Department of Public Instruction
BME	Board of Medical Examiners	EHR	Department of Environment, Health, and Natural Resources
BMS	Board of Mortuary Science	ESC	Employment Security Commission
BOG	Board of Geologists	HAF	Hearing Aid Dealers and Fitters Board
BON	Board of Nursing	HRC	Human Relations Committee
BOO	Board of Opticians	IND	Independent Agencies
CFA	Commission for Auctioneers	INS	Department of Insurance
COM	Department of Economic and Community Development	LBC	Licensing Board for Contractors
CPS	Department of Crime Control and Public Safety	MLK	Milk Commission
CSE	Child Support Enforcement	NHA	Board of Nursing Home Administrators
DAG	Department of Agriculture	OAH	Office of Administrative Hearings
DCC	Department of Community Colleges	OSP	Office of State Personnel
DCR	Department of Cultural Resources	PHC	Board of Plumbing and Heating Contractors
DCS	Distribution Child Support	POD	Board of Podiatry Examiners
DHR	Department of Human Resources	SOS	Department of Secretary of State
DOA	Department of Administration	SPA	Board of Examiners of Speech and Language Pathologists and Audiologists
DOJ	Department of Justice	WRC	Wildlife Resources Commission
DOL	Department of Labor		
DSA	Department of State Auditor		

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Anne Powers v. University of North Carolina at Chapel Hill	91 OSP 0387	Becton	01/29/93
Yadkin Nursing Care Center, Inc. v. DHR, Division of Facility Services, Licensure Section	91 DHR 0393 91 DHR 0801	Gray	02/01/93
Harold G. Patterson v. Department of Correction	91 OSP 1163	Becton	02/08/93
Michael D. Harper v. DHR, Division of Social Services, CSE	91 CSE 1289	Chess	02/10/93
James R. Shupe v. Criminal Justice Ed & Training Standards Commission	92 DOJ 0277	Morrison	02/10/93

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Ashraf G. Khalil v. NCSU-Physical Plant Division	92 OSP 0601	Morrison	02/04/93
Mary E. Nixon v. Department of Human Resources	92 DHR 0731	Becton	02/11/93
Vivian A. Williams v. Department of Human Resources, Cherry Hospital	92 OSP 0750	Mann	02/05/93
Nancy R. Chandler (92-074-013-00) (92-074-014-00) v. Victims Compensation Commission	92 CPS 0812 92 CPS 0813	Morgan	02/10/93
William R. Willis v. Division of Marine Fisheries	92 EHR 0820	Mann	02/04/93
G&G Enterprises, Inc. T/A After Hours Bar v. Alcoholic Beverage Control Commission	92 ABC 0956	Becton	02/01/93
Judy Sue Davenport, T/A The Corner Store v. Alcoholic Beverage Control Commission	92 ABC 1034	Nesnow	02/03/93
Alcoholic Beverage Control Commission v. Y-Bhok Siu T/A O'Henry Food Mart, 3105 Summit Avenue, Greensboro, NC 27405	92 ABC 1075	Chess	02/10/93
Christopher L. King v. Department of Correction	92 OSP 1095	Gray	02/08/93
Samuel T. Timmons v. DHR, Division of Social Services, CSE	92 CSE 1198	Becton	02/08/93
Alcoholic Beverage Control Commission v. Alexander Woods t/a Woods' Save More Market	92 ABC 1281	Nesnow	02/10/93
Alcoholic Beverage Control Commission v. Partnership t/a Johnson's Mini Mart	92 ABC 1283	Nesnow	02/09/93
Rhonda J. Ray v. Harnett Correctional Institute	92 OSP 1376	Nesnow	02/03/93
Obira R. Griggs Sr. v. EHR, Division of Maternal & Child Health, Nutrition Svcs	92 EHR 1757	West	02/11/93

CONTESTED CASE DECISIONS

CASE NAME	CASE NUMBER	ALJ	FILED DATE
Juanita Davis v. Brunswick County Board of Education	93 EDC 0018	Nesnow	02/01/93
Kimberly J. Burcham v. Department of Social Services	93 DHR 0062	Gray	02/10/93

STATE OF NORTH CAROLINA

COUNTY OF WAYNE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 OSP 0750

VIVIAN A. WILLIAMS,
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
HUMAN RESOURCES, CHERRY HOSPITAL,
Respondent.

RECOMMENDED DECISION

This contested case was heard before Julian Mann, III, Chief Administrative Law Judge, on November 23, 1992, at the Wayne County Community College, Goldsboro, Wayne County, North Carolina. The record closed in this contested case on December 23, 1992, with the Respondent's filing of its Proposed Findings of Fact, Conclusions of Law and Recommended Decision.

APPEARANCES

For Petitioner: W. Timothy Haithcock
Barnes Braswell Haithcock & Warren, P.A.
231 E. Walnut Street
P. O. Drawer 7
Goldsboro, North Carolina 27533-0007
Attorney for Petitioner

For Respondent: John R. Corne
Special Deputy Attorney General
N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602-0629
Attorney for Respondent

ISSUE

Whether or not there was just cause to dismiss Petitioner from her employment at Cherry Hospital for personal misconduct.

WITNESSES

For Petitioner: Annie Dixon
Delores Hines
Carl Sullivan
Delores McNair
Wilbert Evans
Norma Teachey
Olivia Patterson

For Respondent: Patricia N. Williams
Kathryn Forehand
Vivian Williams, Petitioner

EXHIBITS

For Petitioner: Petitioner's Exhibit #1, 2 and 3

For Respondent: Respondent's Exhibit #2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 16

STIPULATIONS

On November 23, 1992, the parties filed a Prehearing Order with the presiding Administrative Law Judge. Contained in the Prehearing Order are certain Stipulations. These Stipulations, in part, are set out below:

"A. It is stipulated that all parties are properly before the court and the court has jurisdiction over the parties and of the subject matter.

B. It is stipulated that all parties have been correctly designated that there is no question as to misjoinder or nonjoinder of the parties.

C. In addition to the other stipulations contained herein, the parties hereto stipulate and agree as to the following undisputed facts:

1. Petitioner has never been counselled, orally or in writing, or had she been reprimanded prior to February 14, 1992.

2. As of February 14, 1992, Petitioner had 15 years, 3 months of uninterrupted State employment.

3. At the time of her dismissal, Petitioner was a "permanent state employee" as that term is used in G.S. 126-29.

4. Petitioner was a member of the nursing staff at Cherry Hospital.

5. Petitioner worked second shift in 1 East Woodard, an ICF ward.

6. Normally a Health Care Technician ("HCT") II would be on the second shift for February 14, 1992.

7. On February 14, 1992, a HCT II was on duty in 1 East Woodard, however, the HCT II became ill and left duty at approximately 4:00 PM when Petitioner arrived on duty.

8. Besides Petitioner, there was one other employee who normally works the 3:15 - 11:45 PM shift who arrived at 5:50 PM, February 14, 1992.

9. Petitioner had never been counselled or reprimanded regarding falsifying a unit document with regard to accountability of a patient or any other subject.

10. The HCT II, or the person left in charge, normally makes all shift assignments to staff present that would include the Multipurpose Flow Sheet.

11. At the time of her discharge, Petitioner was earning \$18,325.00 and occupied a pay grade 56."

Based upon the foregoing Stipulations and by the greater weight of the admissible evidence, which

by its nature required determination of witness credibility by observation of witness demeanor, the Chief Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

2. Petitioner is a resident of Goldsboro, Wayne County, North Carolina, and a permanent State employee as defined in G.S. 126-39.

3. Cherry Hospital is a psychiatric hospital operated in the state system by Respondent and located in Goldsboro, Wayne County, North Carolina.

4. On February 14, 1992, Petitioner was assigned to 1 East Woodard at Respondent hospital. The second shift begins at 3:15 p.m. and ends at 11:00 p.m.

5. 1 East Woodard is a geriatric intermediate care facility/unit (ICF) which provides care for patients who are 65 years of age or older. These patients have various types of physical problems resulting from pathogenesis and are generally confused, disoriented, and require constant supervision by the staff assigned to 1 East Woodard.

6. On February 14, 1992, 26 patients were assigned to 1 East Woodard.

7. On February 14, 1992, Patricia N. Williams, R.N., held the position of Nurse Manager and was the supervisor of 1 East Woodard. Ms. Patricia N. Williams had supervised Petitioner from December, 1991 until her dismissal on March 9, 1992.

8. Respondent hospital's adopted policy concerning Patient Accountability which was in effect at all times relevant herein. This policy is contained in a policy notebook, one of which is located on 1 East Woodard. The Cherry Hospital Nursing Services Policy (Patient Accountability) in effect on February 14, 1992, provides, in pertinent part:

"Each patient shall be accounted for at least hourly, utilizing the patient accountability sheet...

The responsibility for patient accountability shall be assigned on the daily technician assignment sheet by the charge technician or the lead nurse.

Hourly checks will consist of:

1. Looking at the patients who are on the ward.
2. Noting patients who are out on OSPC, passes, clinics with a code to signify staff know where patients are at all times.

The technician performing the check, initials the last block under the relevant time frame, clearly indicating that they performed the check and that it is accurate."¹

9. The Patient Accountability Work Sheets are kept on a clipboard in 1 East Woodard.

¹The present patient accountability system does not require hourly verification if the patient is off the ward. (Petitioner's Exhibit #1)

10. Petitioner was aware of the Respondent's policy concerning Patient Accountability. There was a separate Patient Accountability Work Sheet for each patient on 1 East Woodard.

11. Respondent hospital had adopted a policy concerning Multi-Purpose Flow Sheets, which was in effect at all times relevant hereto. On February 14, 1992, Petitioner was aware of and understood the procedure for filling out the Multi-Purpose Flow Sheets.

12. The purpose of the Multi-Purpose Flow Sheet is to document daily care and to monitor patients. Licensing surveyors look to the Multi-Purpose Flow Sheet as evidence that care has in fact been provided to patients at Cherry Hospital. The Multi-Purpose Flow Sheet is used to record and monitor patient vital signs which are essential in assessing the patient and are an important indicator of patient progress, response to medication, illness and treatment. Compliance with vital sign orders is necessary to render and to demonstrate appropriate care for a patient. There was a separated Multi-Purpose Flow Sheet for each patient on 1 East Woodard. The Multi-Purpose Flow Sheets become part of the patient's permanent record.

13. The Multi-Purpose flow Sheet is also used to record meals, snacks and nutritional supplements required by each patient. The hours of sleep, bathing, oral care, hygiene, foot/nail care, skin care and bowel movements are also required to be recorded on the Multi-Purpose Flow Sheet.

14. On February 14, 1992, Petitioner was aware of Respondent's policy concerning Multi-Purpose Flow Sheets and that initialing the Flow Sheet certified that the notations are correct and that the patient actually received the care indicated on the Flow Sheet.

15. On September 25, 1991, Petitioner attended training which specifically covered the Respondent's policy concerning Multi-Purpose Flow Sheet protocol.

16. The Multi-Purpose Flow Sheets are kept in a flow sheet book on the unit.

17. The normal staffing for the second shift on 1 East Woodard was three Health Care Technicians (hereinafter "HCT").

18. On February 14, 1992, Petitioner arrived at 4:00 p.m. for her shift on 1 East Woodard. The HCT II assigned on the second shift for 1 East Woodard was Olivia Patterson. Ms. Patterson had become ill and left 1 East Woodard at the time Petitioner arrived.

19. Eunice Hines, HCT I, was also assigned to second shift in 1 East Woodard. Ms. Hines reported to work at 5:15 p.m. on February 14, 1992.

20. Ms. Jackie Williams, HCT I, stayed over from the first shift until Ms. Hines arrived.

21. Ms. Patricia Williams was on 1 East Woodard several times after 4:00 p.m. because of the staff shortage and to arrange staff coverage. Ms. Patricia Williams called in Margaret Jones, HCT I, to work overtime in order to bring 1 East Woodard up to the normal staffing level.

22. Ms. Jones arrived at 6:00 p.m. on February 14, 1992.

23. Beginning at 6:00 p.m. and through the end of the second shift, there were three HCT's on duty on 1 East Woodard which is the normal staffing level for 1 East Woodard.

24. When coming on duty at 4:00 p.m., February 14, 1992, Petitioner voluntarily assumed the duties and responsibilities of filling out the Patient Accountability Work Sheets and the Multi-Purpose Flow Sheets for the patients on 1 East Woodard.

25. At approximately 1:15 p.m., February 14, 1992, Cherry staff members had taken several patients from 1 East Woodard, including Narvella B, off the unit for a bus ride.

26. About 3:35 p.m., February 14, 1992, the bus returned to the area of 1 East Woodard where most of the patients were removed but Narvella B remained on the bus. Staff responsible for monitoring patients on the day trip did not notice that Narvella B remained on the bus after all others had exited. The bus was then parked behind the Cherry Hospital Therapeutic Center at approximately 4:00 p.m.

27. Prior to February 14, 1992, Petitioner had many times been responsible for filling out the Patient Accountability Work Sheets and the Multi-Purpose Flow Sheets. During the three months prior to February 14, 1992, Petitioner had filled out Narvella B's Patient Accountability Work Sheets at least sixteen times and Narvella B's Multi-Purpose Flow Sheets at least seventeen times.

28. When the third shift for 1 East Woodard came on duty at 11:30 p.m., February 14, 1992, HCT Ann Ezzell immediately discovered that Narvella B was missing. At 12:00 midnight, Narvella B was discovered alone in the unlocked bus parked behind the Cherry Hospital Therapeutic Center. Narvella B. complained that her hands were cold, but she did not have any other physical problems.

29. During the second shift on 1 East Woodard, Petitioner initialed the Patient Accountability Work Sheet for Narvella B beside 4:00 p.m., 5:00 p.m., 6:00 p.m., 7:00 p.m., 8:00 p.m., 9:00 p.m., 10:00 p.m., and 11:00 p.m.

30. Narvella B. had not been present on 1 East Woodard at any time while Petitioner was on duty.

31. Petitioner, during her shift on February 14, 1992, did not see or attempt to locate Narvella B on 1 East Woodard.

32. Neither Petitioner nor other health care technicians at Respondent's hospital with knowledge of Respondent's "Patient Accountability" policy (Respondent's Exhibit #2) always interpreted the policy to mean an actual requirement of visually verifying the patient's presence every hour particularly during the periods of high work volume and before bed time.

33. Patient accountability verification depended on the location of the patient. Some patients leave their rooms to go to sitting areas or to watch movies. Patients are not normally accounted for during these periods.

34. The accountability sheets (Respondent's Exhibit #8) are not standardized forms as are the multi-purpose forms (Respondent's Exhibit #9) and provide no directions for completion.

35. During the second shift on 1 East Woodard, Petitioner initialed the Multi-Purpose Flow Sheet for Narvella B certifying that Narvella B had been given skin care, Narvella B had had 240 cc of juice, Narvella B had eaten all of her meal and Narvella B had had a bowel movement. Each of the foregoing was certified to have actually occurred notwithstanding the fact that Narvella B had not been present on 1 East Woodard at any time while Petitioner was on duty.

36. The entry of information on the patient Multi-Purpose Flow Sheets does not permit employees to assume that specific care has been provided to the patient without directly administering the care or confirming that such care has been provided.

38. On this occasion, Petitioner implicitly relied on other employees when filling out the Patient Accountability Work Sheets.

39. Had Petitioner performed her duties and responsibilities with respect to patient accountability and recording on the Multi-Purpose Flow Sheet at any time between 4:00 p.m. and 11:30 p.m. February 14, 1992, Petitioner would have discovered that Narvella B was not present on 1 East Woodard.

40. Petitioner knowingly made false entries on the Multi-Purpose Flow Sheet.

41. On March 9, 1992, Petitioner was dismissed from employment at Cherry Hospital. The bases for dismissing Petitioner were the (a) falsification of the February 14, 1992 Patient Accountability Work Sheet for Narvella B certifying that she was present on the unit at 4:00 p.m. and each hour thereafter until 11:00 p.m. and (b) falsification of the February 14, 1992 Multi-Purpose Work Sheet for Narvella B certifying that she had been provided the noted care.

42. Other of Respondent's employees received milder forms of disciplinary action as the result of Narvella B having been left on the bus on February 14, 1992. Petitioner was the only employee dismissed.

43. Petitioner enjoyed a good reputation for honesty. Petitioner worked diligently for the patients and interacted well with them. Petitioner, in her 15 years of service, had never received any disciplinary action.

44. Petitioner received a favorable performance evaluation for the period ending June 30, 1991. (Petitioner's Exhibit #3)

Based upon the foregoing Stipulations and Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. At the time of her dismissal, Petitioner was a permanent state employee as that term is defined in G.S. 126-39 and was subject to the provisions of G.S. 126-35.

2. G.S. 126-35 provides that a permanent state employee can only be dismissed for just cause. Where just cause is the issue, Respondent has the burden of proof.

3. 25 NCAC 1J .0608(a) provides that a permanent state employee may be discharged without any prior warning for unacceptable personal conduct. See also North Carolina Office of State Personnel PERSONNEL MANUAL, section 9, p. 6.

4. 25 NCAC 1J .0604(b) provides that personal conduct discipline is intended to be imposed for actions for which no reasonable person could, or should, expect to receive prior warnings. See also: North Carolina Office of State Personnel PERSONNEL MANUAL, section 9, p. 3.

5. The manner in which Health Care Technicians actually accounted for patients on the wards was known or should have been known to Respondent's Nurse Supervisors in the wards. The actual accountability methods, as they differed from the policy's literal language, has substantial impact on the policy's interpretation. The undersigned cannot conclude as a matter of law that Petitioner's failure to make a visual accounting of each patient hourly resulted in a personal conduct violation which no reasonable person could or should expect prior warnings. Although Petitioner's failure to account for Narvella B was a serious error, it was an error or omission more in the nature of job performance than personal misconduct.

6. There was not just cause to dismiss Petitioner for her errors and omissions in completing the accountability checksheet for Narvella B as this conduct was more in the nature of job performance.

7. The entry of a false and erroneous certification as to the care given to Narvella B as evidenced by the Multi-Purpose Flow Sheets is a personal conduct violation and is an action which no reasonable person could or should expect to receive prior warnings. Such falsification is just cause for dismissal pursuant to G.S. 126-35.²

8. Petitioner did not cause the absence of Narvella B from the ward on February 14, 1992.

²Respondent's decision to discharge Petitioner for her actions are within Respondent's discretion, notwithstanding her prior job history.

Narvella B's absence was caused by the careless actions of other staff more directly accountable. Narvella B's continued absence was caused by the other staff's failure to correct their careless action; by the failure of the Respondent's patient accountability system which did not indicate that this patient was absent from the ward; and by the intervening actions of Petitioner in her failure to render care and properly document it on the Multi-Purpose Flow Sheet.

9. Respondent has met its burden of proving that there was just cause for Respondent's disciplinary action taken against Petitioner based upon the false certification of care rendered to Narvella B as evidenced by the intentional and erroneous entries made on the Multi-Purpose Flow Sheet.

Based upon the foregoing Stipulations, Findings of Fact and Conclusions of Law, the undersigned makes the following:

RECOMMENDED DECISION

The decision to dismiss Petitioner should be upheld as being for just cause based upon the Petitioner's failure to render care and subsequent false certification of care for Narvella B as evidenced by the Multi-Purpose Flow Sheet.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina State Personnel Commission.

This the 5th day of February, 1993.

Julian Mann, III
Chief Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF CARTERET

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 EHR 0820

WILLIAM R. WILLIS,)	
Petitioner,)	
)	
v.)	RECOMMENDED DECISION
)	
NORTH CAROLINA DIVISION OF MARINE)	
FISHERIES,)	
Respondent.)	
)	

This contested case was heard before Julian Mann, III, Chief Administrative Law Judge, on November 20, 1992, in the Carteret County Courthouse, Beaufort, North Carolina. The record closed in this contested case on December 21, 1992, with the Respondent's filing of its Proposed Recommended Decision.

APPEARANCES

For Petitioner:	William R. Willis (<u>pro se</u>) 315 Salter Road Atlantic, North Carolina 28511 Petitioner
For Respondent:	Timothy D. Nifong Assistant Attorney General N. C. Department of Justice P. O. Box 629 Raleigh, North Carolina 27602-0629 Attorney for Respondent

ISSUE

Whether or not Proposed Lease No. 9201 for shellfish cultivation meets the statutory criteria for approval of such leases as provided in G.S. 113-202.

WITNESSES

For Petitioner:	Gerald Malcolm Fulcher, Jr. William E. Smith William Jerry Nelson Melvin Thomas Styron Garland C. Fulcher John M. Martin
For Respondent:	Michael D. Marshall Jeffrey E. French Charles H. Peterson, Ph.D. (expert witness in the area of shellfish research and management) William T. Hogarth Joseph Arthur Huber

EXHIBITS

For Petitioner: Exhibit #1

For Respondent: Exhibit #1, 2, 5, 6, 7, and 9

STIPULATIONS

On or about the 20th day of November, 1992, at approximately 9:03 a.m., a Prehearing Conference Order was filed with the presiding Administrative Law Judge. Contained in the Prehearing Conference Order are certain Stipulations. These Stipulations, in part, are set out below:

"5. In addition to the other stipulations contained herein, the parties stipulate and agree with respect to the following undisputed facts:

a. The Shellfish Lease Application for Shellfish Lease No. 9201 satisfies all technical and procedural requirements necessary to have a valid application as set out by statute and rule.

b. The following shellfish public bottom leasing standards, as set out in G.S. 113-202(a), are satisfied by proposed Shellfish Lease No. 9201:

(1) The area leased must be suitable for the cultivation and harvesting of shellfish in commercial quantities (G.S. 113-202(a)(1);

(2) Cultivation of shellfish in the leased area will not impinge upon the rights of riparian owners (G.S. 113-202(a)(4);

(3) The area leased must not include an area designated for inclusion in the Department's Shellfish Management Program (G.S. 113-202(a)(5);

(4) The area leased must not include an area which the State Health Director has recommended be closed to shellfish harvest by reason of pollution (G.S. 113-202(a)(6).

c. The applicant for proposed shellfish lease No. 9201, Mr. Joseph W. Huber, including the area of this proposed lease, does not hold more than fifty (50) acres of public bottoms under Shellfish Cultivation Leases.

e. The area of bottom applied for under Proposed Shellfish Lease No. 9201 is "as compact as possible" within the meaning of G.S. 113-202(e).

f. The shoreline in the area of the proposed Shellfish Bottom Lease No. 9201 is undeveloped." ¹

Based upon the foregoing Stipulations and by the greater weight of the admissible evidence, which by its nature requires determination of witness credibility by observation of witness demeanor, the Chief Administrative Law Judge makes the following:

FINDINGS OF FACT

¹Reference is made to the Prehearing Conference Order for a complete list of all Stipulations not quoted above.

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to Chapters 113 and 150B (Article 3) of the North Carolina General Statutes.
2. The Petitioner is a citizen and resident of Atlantic, Carteret County, North Carolina.
3. The Respondent is an agency of the State of North Carolina.
4. Joseph A. Huber (hereinafter "Huber") is a citizen and resident of Atlantic, Carteret County, North Carolina.
5. On or about the 25th day of March, 1992, Huber applied with Respondent to lease a certain shellfish bottom, identified by the Respondent as Proposed Lease No. 9201, containing in the original proposed lease 10 acres, more or less, located approximately 2.5 miles southwest of Drum Inlet on the west side of Core Banks, Carteret County, North Carolina, and more particularly depicted in Respondent's Exhibit #1. Huber paid the application fee of \$100.00.
6. The purpose for Proposed Lease No. 9201 was to attempt to implement Huber's plan to use this site as a source of seed clams and seed oysters; to plant one million seed clams and/or oysters annually on each acre of the proposed lease; and to eventually harvest up to 700 bushels of shellfish per acre per year. (Respondent's Exhibit #1)
7. Huber operates a clam hatchery in Atlantic, North Carolina. In that operation, Huber spawns clams to produce larvae, which are grown into seed clams. Mr. Huber's clam hatchery has a capacity to produce 20 million seed clams each year. (Respondent's Exhibit #1)
8. Prior to applying for Proposed Lease No. 9201 in Eastern Core Sound, Huber attempted to find or lease a site on the mainland side of Core Sound near his existing Lease No. 8601 suitable for clam aquaculture, but Huber was unsuccessful in that search.
9. Huber has in the past consistently and substantially exceeded the lease production requirements set out by MFC Rule for Shellfish Lease No. 8601. Huber has demonstrated an ability to successfully spawn, culture and "grow out" clams. He has established himself as one of the leading shellfish aquaculturists in the State of North Carolina. (Respondent's Exhibit #6)
10. A productive lease, such as Proposed Lease No. 9201, benefits the public bottom by providing added broodstock and enhancing recruitment throughout the Sound. With declining natural shellfish populations, this broodstock enhancement is likely to become vital to maintaining recruitment on public bottom. (Respondent's Exhibit #5)
11. Clams mature sexually at one year of age and reproduce by releasing their gametes directly into the water column. Gametes and the larvae that ultimately result from fertilization are subject to tidal and other water currents and may be carried some distance before being deposited on the bottom. Fecundity increases with age. Clams grown on shellfish cultivation leases take three years to reach optimal harvest size and, therefore, will reproduce two or three times prior to being harvested. The state clam fishery benefits from the gametes and clam larvae that are produced by clams on a shellfish cultivation lease because they are then transported offsite by tidal currents and deposited on non-leased public bottoms.
12. On or about May 1, 1992, biologist Stan Sherman, Technician Steve Shelton and Jeffrey French, supervisor, conducted an investigation of Proposed Shellfish Bottom Lease No. 9201. Shellfish sampling is conducted as part of the Respondent's site investigation. The sampling methodology used was accomplished by the three investigators using hand rakes to take a total of 105 square meter bottom samples distributed approximately evenly across the lease. Sampling was completed in about one and one-half hours. (See Respondent's Exhibit #2)
13. A total of 15 clams were collected during sampling consisting of two littleneck clams, one

cherrystone clam, and twelve chowders.

14. Based on the number of clams collected in the sampling survey when considered in proportion to the total area of the proposed lease, shellfish density for the Proposed Lease No. 9201 is 1.4 bushels per acre.

15. The size of Proposed Lease No. 9201, as originally submitted by the applicant, was 10 acres. Following comments at a public hearing held in Carteret County for this proposed shellfish lease, significant public clamming activity was found to have occurred around the periphery of the proposed lease site. The Respondent approved the proposed lease at the reduced size of seven acres in order to exclude an approximately 50 foot buffer around its edge. The outer areas contained approximately two bushels per acre based upon Respondent's estimation. The outer areas were precluded from the original lease.

16. The term "natural shellfish bed" is defined in G.S. 113-201.1(a) as: "...an area of public bottom where oysters, clams, scallops, mussels or other shellfish are found to be growing in sufficient quantities to be valuable to the public."

17. 15A NCAC 30. 0201(a)(1)(A) defines "natural shellfish bed" to mean: "...ten bushels or more of shellfish per acre."

18. The present 10 bushel per acre leasing standard was derived from the historical leasing standard which stated that an area wherein a person "can make a days work" could not be leased. In prior history, each coastal county had an appointed "Oysterman", who, among other duties, conducted the State shellfish lease investigations for proposed leases to determine if he could make a days work at the proposed lease site. Over time, Respondent took samples to determine what quantities of shellfish were present at sites the oysterman determined were not leasable because he could make a days work there. From that sampling it was determined that, on average, the oysterman could make a days work when the site contained 10 or more bushels of shellfish per acre. That quantity was subsequently codified in Rule 15A NCAC 30. 0201(a)(1)(A) (January 1, 1991). (Respondent's Proposed Finding of Fact #14)

19. The standard of 10 bushels per acre established as the production measure to determine "sufficient quantities to be valuable to the public" has been the standard for at least 15 years.

20. Opinion as to what is a "days work" and therefore is a quantity shellfish sufficient to be valuable to the public, varies widely among and between both commercial fishermen and state regulators. (Respondent's Proposed Finding of Fact #15) Significant numbers of commercial shellfishermen clam in Core Sound along the western edge of Core Banks. On average, Core Banks clambers take an average of about 400 to 600 clams, or about one bushel of clams or slightly more per day.

21. Under the 10 bushel per acre standard, incomplete Respondent's survey data results indicate that as much as 70% of North Carolina's submerged coastal bottoms contain less than 10 bushels per acre and are therefore subject to leasing under the Shellfish Leasing Program, assuming that the other (statutory) criteria are met. The Marine Fisheries Commission is presently, through its Shellfish Committee, reexamining the 10 bushel per acre leasing standards for continuing viability. (Respondent's Proposed Findings of Fact #16)

22. The stratified haphazard sampling method using hand rakes employed by the Respondent in its investigation of Proposed Lease No. 9201 is accepted and widely used within the scientific community as a valid means to sample submerged bottoms to determine shellfish densities because the results are both repeatable and appropriately reliable.

23. Those portions of the lease vegetated by eel-grass could provide suitable scallop habitat and some commercial fishermen have harvested scallops from the general vicinity of the proposed lease area. However, Respondent's investigators found no evidence of scallops within the scattered eel-grass patches actually on the proposed lease site.

24. Conflicting testimony existed among the witnesses as to what was the appropriate standard as to the number of bushels of shellfish existing on a site per acre to be in sufficient quantities to be valuable.

25. In Professor Peterson's (Respondent's expert witness) letter of June 25, 1992, he states: "With declining natural shellfish populations, this broodstock enhancement is likely to become vital to maintaining recruitment on public bottom." (emphasis added) Shellfish populations in this area are declining. (Respondent's Exhibit #5)

26. Inasmuch as Respondent determined that two bushels per acre of clams were likely to exist on the periphery of the original 10 acre lease and thus excluded that portion from the proposed lease to reduce its net size from 10 acres to 7 acres, it is deemed an admission by Respondent that 2 bushels per acre was "growing in sufficient quantities to be valuable to the public."

27. The existence of 1.4 bushels of shellfish per acre is not a sufficient quantity of shellfish to be a "natural shellfish bed."

28. The standard of 10 bushels per acre found in 15A NCAC 30. 0201(a)(1)(A), is unclear and ambiguous to persons it is intended to direct, guide or assist and cannot be the standard by which "shellfish are found to be growing in sufficient quantities to be valuable to the public."

29. No substantial evidence was offered to show that Proposed Lease No. 9201, standing alone, would significantly affect existing public recreational uses of the Core Banks area of Cape Lookout National Seashore.

30. Core Sound, which is located on the west side of Core Banks, provides a protected harvest area for commercial gill net and mullet net fishermen in Carteret County. The proposed lease site is neither unique nor significantly different from other locations on the west side of Core Banks. The use of the proposed lease for clam cultivation, including predator protection nets, will not substantially interfere with commercial fishing activities in Core Sound or along Core Banks.

31. Navigational use of the proposed lease site is limited by the shallow depth of the water which is between 1 and 2.5 feet in depth. The proposed lease is offset from the shore 100 feet and extends east to west for only a portion of the width of the protected channel. In the area of the proposed lease there are existing potential hazards to navigation within the protected channel caused by private activities on the public bottom such as pound nets.

32. Due to the width of the navigational channel, the relatively small area occupied by the proposed lease and the general unsuitability of the shallow waters overlying the site to intensive navigational use, the cultivation of shellfish on the proposed lease would not substantially affect either recreational or commercial navigation in the lease site area.

Based upon the foregoing Stipulations and Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this contested case pursuant to Chapters 113 and 150B of the North Carolina General Statutes.

2. Huber has affirmatively established the ability, based both on his knowledge and experience with clam culture and on his past performance, to utilize a clam lease larger than five acres in size, in satisfaction of the requirements set out in 15A NCAC 30 .0201(a)(1)(C)(ii).

3. Proposed Lease No. 9201 is and will be compatible with lawful utilization by the public of other marine and estuarine resources.

4. By stipulation, which establishes a fact without further proof or offer of evidence, the statutory standards found in G.S. 113-202(a)(1)(4)(5) and (6) are conclusively established and are otherwise satisfied by Proposed Lease No. 9201.

5. Respondent is charged under G.S. 113-202(e) to separate "an initial lease or amended initial lease...a sufficient distance from any known natural shellfish bed..." (emphasis added). The Respondent by precluding the two areas of the outer limits of Proposed Lease No. 9201 containing 2 bushels of shellfish per acre is deemed an admission by Respondent that clams existing in numbers approaching 2 bushels per acre are a natural shellfish bed and are sufficient quantities to be valuable to the public under the provisions of G.S. 113-201.1(a).

6. Respondent's rule 15A NCAC 30 .0201(a)(1)(A) which purports to define "natural shellfish bed" is found to be unclear and ambiguous to persons it is intended to direct, guide or assist and, therefore, pursuant to the authority found in G.S. 150B-33(9), is declared void as applied in this contested case.

7. 15A NCAC 30 .0201 also attempts to provide standards "in addition" to the standards in G.S. 113-202 in defining a natural shellfish bed in subsection (1) and thereby 15A NCAC 30 .0201(a)(1)(A) is declared void as applied in this contested case upon the additional authority that the promulgator has exceeded its statutory authority by creating additional criteria that goes further than those criteria established in G.S. 113-202.

8. The substantial evidence in the record is that the bottom at Proposed Lease No. 9201 contains less than 2 bushels of shellfish per acre as established by scientific methodology. The Petitioner has made no showing of what quantity of shellfish per acre actually exists on the proposed lease site to challenge Respondent's determination. Respondent's determination of 1.4 bushels per acre is accepted as reliable evidence.

9. Based upon Respondent's admission of 2 bushels per acre as the most reliable evidence of the numbers of shellfish existing per acre to constitute a natural shellfish bed, [(and not by Rule 15A NCAC 30 .0201(a)(1)(A)], the existence of only 1.4 bushels of clams per acre on Proposed Lease No. 9201 are not sufficient numbers existing to constitute a "natural shellfish bed" as defined in G.S. 113-201.1; and, therefore, the Proposed Lease No. 9201 cannot be defeated under the provisions of G.S. 113-202(a)(2).

10. All of the statutory requirements for Proposed Lease No. 9201 are found to be present and therefore under the provisions of G.S. 113-202, the Respondent should issue Lease No. 9201 to Huber.

Based upon the foregoing Stipulations, Findings of Fact and Conclusions of Law, the undersigned makes the following:

RECOMMENDED DECISION

That the Marine Fisheries Commission affirm the recommendation of the Respondent and issue shellfish cultivation Lease No. 9201 to Joseph A. Huber, if the Commission finds that based on the record evidence approval of the proposed lease is in the public interest. Final lease approval should appropriately be conditioned, if necessary, to protect the public's interest as determined in the sound discretion of the Commission.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b). Rule 15A NCAC 30 .0201(a)(1)(A) is declared void as applied in this contested case pursuant to G.S. 150B-33(a).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Marine Fisheries Commission.

This the 4th day of February, 1993.

Julian Mann, III
Chief Administrative Law Judge

APPEARANCES

For Petitioner: Larry S. Height
Chief Agency Legal Specialist
N. C. ABC Commission
P.O. Box 26687
Raleigh, North Carolina 27611-6687
Attorney for Petitioner

For Respondent: William L. Stagg
Attorney At Law
Suite 323
Law Building
Charlotte, North Carolina 28202
Attorney for Respondent

ISSUES

1. Did the Respondent's employee sell malt beverages to Joseph Lowry, a person less than 21 years of age, on the licensed premises on or about July 31, 1992, at 2:25 p.m., in violation of G.S. 18B-302(a)(1)?
2. Did the Respondent's employee knowingly sell or give alcoholic beverages to an intoxicated person on the licensed premises on or about August 7, 1992, at 4:30 p.m., in violation of G.S. 18B-305(a)?
3. Did the Respondent's employee knowingly sell or give alcoholic beverages to an intoxicated person on the licensed premises on or about August 15, 1992, at 2:15 p.m., in violation of G.S. 18B-305(a)?
4. Did the Respondent's employee knowingly sell or give alcoholic beverages to an intoxicated person on the licensed premises on October 6, 1992, at 5:45 p.m., in violation of G.S. 18B-305(a)?

STATUTES AND RULES IN ISSUE

N.C. Gen. Stat. 18B-302(a)(1)
N.C. Gen. Stat. 18B-305(a)
N.C. Gen. Stat. 18B-104(b)

STIPULATION AGREEMENTS

The Respondent stipulates that the four violations which are being outlined as the Issues, above, are admitted.

FINDINGS OF FACT

1. The Respondent holds the following permits issued by the North Carolina Alcoholic Beverage Control (ABC) Commission:

Off premise malt beverage #15268B
Off premise fortified wine #15268F
Off premise unfortified wine #15268D
2. Woods' Save More Market is on Beatties Ford Road in Charlotte, North Carolina, and is operated by William David Jackson.
3. Eleanor J. Washington lives nearby in University Park and passes the store frequently.

4. People congregate outside Woods' Save More Market drinking openly. There are sometimes as many as fifteen people.

5. There are schools nearby and school buses drive past the market on Beatties Ford Road.

6. Ms. Washington has personally entered Woods' Save More Market and asked the operator to stop selling wine to the people who congregate outside.

7. The operator responded that he had a license for many years and he would not stop selling wine to those people.

8. Ms. Washington approached some of the people who congregate outside the store and asked if there was anything the community could do "to help them." Some of them replied that she could get them "sent to Broughton."

9. Officer Andrew Kornberg, a Charlotte Police Officer, testified that he is assigned to the Charlie One District and is a "Community Police Officer" as part of the program the City of Charlotte started six to eight months earlier.

10. The program was started to facilitate communication and cooperative efforts between the communities and the police.

11. Large group of people used to congregate both in front of Woods' Save More Market and the market across the street, which also held permits from the ABC Commission.

12. On one occasion, Officer Kornberg talked to the people in the community about their concerns and they all expressed concern about the people congregating in front of Woods' Save More Market.

13. Officer Kornberg testified that the people who stand in front of the market are drinking wine, throwing down glass bottles, and that there are drug dealers mingled in with the group.

14. Officer Kornberg approached the operator of the store across the street from Woods' Save More Market in the summer of 1992. The store was at that time recently under new management.

15. There is a large tree near the store across the street where the people used to congregate and Officer Kornberg observed that there was a great deal of debris under the tree, including broken glass and syringes.

16. The new management of the store across the street cooperated with Officer Kornberg, hired a security officer, and changed the emphasis of sales away from the sale of wine.

17. After that, the people stopped congregating near that store but continued to congregate near Woods' Save More Market.

18. Officer Kornberg approached William Jackson, the operator of Woods' Save More Market and asked him to cooperate with the community efforts. Mr. Jackson said he would but there was no change in the people congregating in front of Woods' Save More Market.

19. On one occasion, a news crew was filming the men congregated in that location and while the news crew was there, one of the men went to the side of the building and urinated.

20. Officer Kornberg observed that the people would occasionally light fires in the area behind the Market to keep warm in cold weather.

21. Officer Kornberg has spoken with Mr. Jackson on numerous occasions but has not observed

any change.

22. Officer Kornberg does not know the hours when Woods' Market is open and there are no hours posted, but he has observed the gathering of people between 10:00 a.m. and 6:00 p.m.

23. Respondent made an Offer and Compromise to the Commission which included admitting the charges outlined in the Issues and a 60 day suspension to be effective starting March 5, 1993, with the last 30 days of the suspension suspended for a period of one year on the provision that the Respondent not further violate the ABC laws and regulations.

CONCLUSIONS OF LAW

1. Respondent's employee sold alcoholic beverage to a minor, Joseph Lowry, on July 31, 1992, at 2:25 p.m., in violation of G.S. 18B-302(a)(1).
2. Respondent's employee knowingly sold or gave alcoholic beverages to an intoxicated person on the licensed premises on August 7, 1992, at 4:30 p.m., in violation of N.C. Gen. Stat. 18B-305(a).
3. Respondent's employee knowingly sold or gave alcoholic beverages to an intoxicated person on the licensed premises on August 15, 1992, at 2:15 p.m., in violation of N.C. Gen. Stat. 18B-305(a).
4. Respondent's employee knowingly sold or gave alcoholic beverages to an intoxicated person on the licensed premises on October 6, 1992, at 5:40 p.m., in violation of N.C. Gen. Stat. 18B-305(a).

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

RECOMMENDATION

It is recommended that the Commission not accept the Offer and Compromise as outlined above and that the Commission revoke the Respondent's permits.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Alcoholic Beverage Control Commission.

This the 10th day of February, 1993.

Dolores O. Nesnow
Administrative Law Judge

STATE OF NORTH CAROLINA
COUNTY OF RICHMOND

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
92 EHR 1757

OBIRA R. GRIGGS SR.)	
Petitioner,)	
)	
v.)	
)	RECOMMENDED DECISION
N. C. DEPARTMENT OF ENVIRONMENT,)	
HEALTH AND NATURAL RESOURCES,)	
DIVISION OF MATERNAL AND CHILD HEALTH,)	
NUTRITION SERVICES SECTION)	
Respondent,)	
)	

This contested case was heard on January 28, 1993, in Raleigh, North Carolina by Administrative Law Judge, Thomas R. West.

APPEARANCES

Petitioner appeared pro se.

Respondent was represented by Assistant Attorney General, Belinda A. Smith

EXHIBITS

Exhibits listing has been omitted from this publication. It can be obtained by contacting this office.

ISSUES

1. Did Petitioner violate the administrative rules governing the WIC program in the manner set forth in the "Notice of Intent to Disqualify" issued December 2, 1992?
2. If so, did Respondent act according to law by disqualifying Petitioner from participation in the WIC program for a period of 135 days?

BURDEN OF PROOF

The burden is on Respondent, N. C. Department of Environment, Health and Natural Resources (hereafter "EHNR"), to prove, by the greater weight of the substantial evidence, that Petitioner acted in the manner alleged and that disqualification is the appropriate sanction.

OFFICIAL NOTICE

Official notice is taken of G.S. 130A-23 and 15A NCAC 21D .0200-.0806.

STIPULATION

The parties stipulated at the hearing of this case that the four (4) violations set forth in the "Notice of Intent to Disqualify" dated December 2, 1992 (Exhibit R7) did, in fact, occur.

Based on the foregoing, and Petitioner's testimony, the undersigned finds the following to be the facts:

FINDINGS OF FACT

1. Petitioner, Obira R. Griggs Sr. (hereafter "Griggs") entered into a WIC Vendor Agreement (R1) on May 20, 1992. Respondent, EHNR, was a party to the Agreement and is charged with enforcing the laws governing the WIC program.
2. The WIC Vendor Agreement (hereafter "Agreement") requires the following of WIC vendors in paragraph 1(p):
 - a. Vendor must stock two (2) kinds of infant formula-SMA with iron and Nursoy. A minimum inventory of sixty-two (62) thirteen (13) ounce cans must be in the Vendor's inventory;
 - b. Vendors must stock a minimum inventory of six (6) fluid gallons of milk;
 - c. All foods must be within the manufacturer's expiration date;
 - d. Two (2) types of cheese must be stocked.
3. On October 9, 1992, an inspector employed by EHNR visited Grigg's store to monitor Grigg's compliance with the WIC vendor agreement. The inspector found that Grigg's inventory of baby formula was fifty-four (54) cans rather than the minimum of sixty-two (62) required and that only one (1) kind of cheese was in stock.
4. On October 9, 1992, the inspector completed a Vendor Monitoring Report (R2) stating the two deficiencies. The report states in paragraph (V)(B) that it "... serves as a warning ..."; that inspectors "... will be revisiting ... within two weeks to review [the] store's procedures and stock"; and that "[i]f the store is not in compliance at that time, it may be disqualified from the WIC Program."
5. The Monitoring Report states as the "Vendor's plan and timeframe to correct deficiencies" that Griggs "Will pick-up goods today."
6. On October 19, 1992, EHNR assessed Griggs five (5) points for failing to maintain a sufficient inventory. EHNR had done no reinspection, as it stated it would, to review Griggs' procedures and stock.
7. On October 26, 1992, an inspector employed by EHNR visited Griggs' store to monitor his compliance with the WIC Vendor Agreement. The inspector found that Griggs had stocked only 4.5 gallons of fluid milk rather than the six (6) gallons required, and that one box of baby cereal in the store's inventory had expired. Griggs had in stock more than sixty-two (62) cans of formula of both varieties required.
8. On October 26, 1992, the inspector issued a WIC Monitoring Report (R4) stating the deficiencies to Griggs and giving him the same warning stated in the Report dated October 9, 1992.
9. Griggs' stated plan and timeframe to correct the deficiencies was to "Pull cereal shelf off today. Milk will be in tomorrow morning."
10. Eight (8) days later, on November 3, 1992, EHNR assessed Griggs 2.5 points for the expired cereal and 5 points for the insufficient inventory.
11. On November 13, 1992, an inspector employed by EHNR visited Griggs' store to monitor compliance with the WIC Vendor Agreement (R6). Griggs had in stock twelve (12) gallons

of fluid milk; seven (7) pounds of cheese of two (2) varieties; all baby cereal was within the manufacturer's expiration date; and sixty-two (62) cans of SMA with iron baby formula were in stock. Griggs had no Nursory.

12. On November 13, 1992, the inspector issued a Vendor Monitoring Report stating that at least one thirteen (13) ounce can of Nursory must be stocked. Griggs' stated plan of correction was to pick up the Nursory that day.
13. The Monitoring Report stated the same warning and made the same commitment to a reinspection within two (2) weeks as the former reports.
14. Nineteen (19) days later, EHNR disqualified Griggs from the WIC program for the violations on October 9, 1992, October 26, 1992 and November 13, 1992 (R7). EHNR performed no reinspection.
15. On page ten (10) of the North Carolina WIC Vendor MANUAL, (R8) EHNR discusses "Vendor Monitoring." EHNR states that if problems are uncovered during a monitoring visit, "... the vendor must take steps to correct the problem(s). Failure to respond to a monitoring review is cause for disqualification from the WIC program." The visits are described as "... opportunities for vendors to receive training, discuss problems and ask questions."
16. On page eleven (11) of the WIC manual, EHNR states that Vendors will be disqualified from the program if they have failed to meet the requirements of the vendor agreement or committed "... substantial violations" Failure to maintain minimum inventory is not listed as a substantial violation.

ANALYSIS AND CONCLUSIONS OF LAW

EHNR expects Griggs to hew to the written word of the Vendor Agreement. So, too, must EHNR adhere to the written word of its Vendor Monitoring Form and Vendor Manual.

On October 9, 1992, EHNR discovered Griggs did not stock enough cans of baby formula and only stocked one kind of cheese. EHNR discussed a plan of correction, told Griggs in writing that it would be revisiting within two (2) weeks, and told him that if he was not in compliance at that time, the store may be disqualified. EHNR did not wait to determine if the plan of correction was successful. It assessed points ten (10) days later, seven (7) days before a reinspection.

The reinspection on October 26, 1992 showed that Griggs had corrected the problem with the inventory of formula and cheese. This time, he was short a gallon and a half (1 1/2) gallon of milk and had one (1) box of expired cereal. Once again, a plan of correction was discussed, a promise of a reinspection made and an assessment of points made prior to the reinspection.

A third inspection revealed no problems with the cheese, cereal, fluid milk inventory, nor the number of cans of baby formula. This time Griggs had only one kind of formula rather than the two required. A plan of correction was made, a promise of reinspection was made and, once again, points were assessed prior to reinspection. We have no knowledge as to whether Griggs corrected the problems by stocking the second kind of formula.

The assessment of points made on October 19, 1992 is void. It was made contrary to the regulatory scheme of discovering problems WIC vendors are having and then allowing vendors two (2) weeks to correct them. The assessment is contrary to EHNR's written promise to Griggs.

The assessment of points made on November 3, 1992 is void for the reasons stated above.

Most of the assessment of points on December 2, 1992 is void. The assessment of five (5) points for insufficient inventory on October 9, 1992 is now valid. On October 9, 1992, Griggs was told about the problems with his inventory of baby formula. Although he made a plan of correction and followed it, by November 13, 1992 he once again had insufficient inventory of formula.

The assessments of points for insufficient inventory and expired foods on October 26, 1992 were void. The assessments were made prior to reinspection by EHNHR. Reinspection on November 13, 1992 shows that Griggs complied with the plan of correction EHNHR discussed with him.

The assessment of points for insufficient inventory found at the November 13, 1992 inspection is void. The assessment of points was made prior to reinspection by EHNHR. There is no evidence that Griggs failed to follow the plan of correction.

As a result, Griggs has been assessed only five (5) points properly and his disqualification from the WIC program is erroneous.

The WIC program, in its Vendor Manual and in its compliance inspection program, has established a system whereby vendors are disqualified if they fail to correct non-substantial violations. Vendors are not to be disqualified when they commit minor violations but correct them consistent with the plans of correction arrived at through discussion with WIC compliance inspectors. I urge the WIC program to follow the genius of its own enforcement program rather than engaging in a mechanistic enforcement scheme.

Based on the foregoing, the undersigned makes the following:

RECOMMENDED DECISION

Petitioner shall not be disqualified from the WIC program. Griggs should be assessed five (5) points for failing to stock the minimum inventory of baby formula as pointed out to him on October 9, 1992 and as he himself acknowledged that he would. A WIC inspector should re-inspect Grigg's store to determine whether he has followed the plan of correction agreed to by EHNHR and Griggs on November 13, 1992.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, N.C. 27611-7447, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and proposed findings of fact and to present oral and written arguments to the agency. G.S. 150B-40(e).

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record. G.S. 150B-42(a). It is requested that the agency furnish a copy to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Department of Environment, Health and Natural Resources.

This the 11th day of February, 1993.

Thomas R. West
Administrative Law Judge

The North Carolina Administrative Code (NCAC) has four major subdivisions of rules. Two of these, titles and chapters, are mandatory. The major subdivision of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. The other two, subchapters and sections are optional subdivisions to be used by agencies when appropriate.

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